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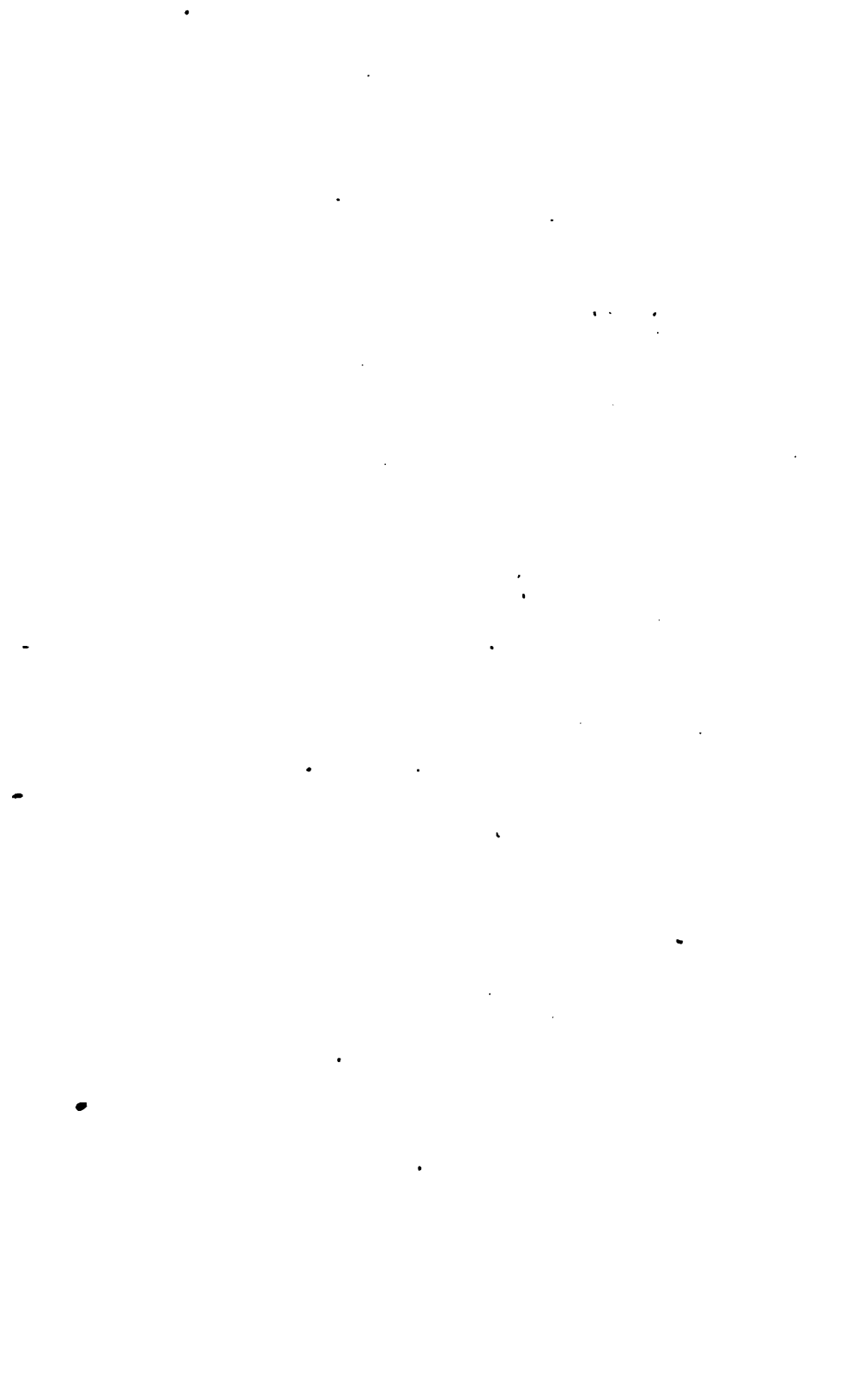
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THE

ONTARIO WEEKLY REPORTER

AND

INDEX-DIGEST

MAY-DECEMBER, 1907

EDITOR :

E. B. BROWN, Esquire

BARRISTER, ETC.

VOLUME X.

TORONTO :

THE CARSWELL COMPANY, LIMITED

1907.

Entered according to Act of Parliament of Canada, in the year one thousand
nine hundred and seven, by THE CARSWELL COMPANY, LIMITED, in the
office of the Minister of Agriculture.

FEB 11 1908

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THE
ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MAY 18TH, 1907).

VOL. X.

TORONTO, MAY 23, 1907.

No. 1

APRIL 22ND, 1907.

C.A.

OWEN v. MERCIER.

Deed—Conveyance of Land—Breach of Condition—Unauthorized Insertion of Condition after Execution and Delivery of Deed—Deed Operative to Pass Property notwithstanding Defective Description—Invalidity of Condition.

Appeal by defendants from judgment of BOYD, C., 12 O. L. R. 529, 8 O. W. R. 151.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. E. Middleton, for defendants.

C. A. Moss, for plaintiff.

OSLER, J.A.:—The action is brought to recover possession of lot No. 16 in the 4th concession north of the Kaministiquia river, in the township of Neebing. Plaintiff relies upon the breach of a condition in the deed by which he conveyed the land to the defendants, or those under whom they claim.

The material facts are few, and may be very briefly stated.

The plaintiff agreed to sell the property to one Tonkin for \$300, subject to a mortgage for \$250.

On 19th February, 1904, a conveyance thereof was formally and completely signed, sealed, and delivered by plaintiff, in which, at Tonkin's request, the name of one Martin Booth was inserted as that of the purchaser, and plaintiff sent it to the purchaser's agent for registration. The purchase money had not been paid in full, but plaintiff was making no difficulty about that. The registrar declined to

record the deed, on the ground that the description of the property was defective, there being a range of concessions on each side of the Kaministiquia river, and the description not stating on which side of the river the concession mentioned in it was situate. The deed was, therefore, returned to plaintiff in order that the description might be rectified by writing in the words "north of the Kaministiquia river" after the words "4th concession," and this was done. While, however, the deed was in the plaintiff's possession for this purpose, he became aware, or thought he had reason to suspect, that it was the intention of the purchaser, or of those for whom he held or to whom he was about to convey the property, to build a house upon it which was to be used for the purposes of a house of ill-fame, and he inserted at the end of the deed a condition that in that event the whole of the land should revert to the vendor, his heirs or assigns, with all improvements thereon. Thus altered, he returned the deed to the purchaser, who, seeing that the description had been corrected, but in ignorance that any other alteration had been made, caused it to be registered.

The defendants are in possession under the deed, the purchase money has been paid, the covering mortgage paid off and assigned, and valuable improvements made upon the land.

It is unnecessary to notice at length the subsequent dealings with the property, as they do not affect plaintiff's rights, if he is entitled to rely upon the condition.

We are unable to adopt the view that, so far as the conveyance of and title to the land was concerned, the transaction between the plaintiff and his vendee had not been completed when the deed was sent back to him for correction. Having been regularly signed, sealed, and delivered, the deed had become, as the plaintiff himself admits, the property of the purchaser, and, as he also admits, he had no authority whatever to make any change in it beyond correcting the description for the purposes of registration. He admits, too, that he did not call the attention of the purchaser to the other alteration, and there seems no reason to doubt that the latter was ignorant that it had been made when he sent the deed to the registry office. It is clear also that, whatever difficulty the omission in the description may have given rise to as regards its registration, the conveyance was operative to pass the property, the fault in the description merely rendering

it equivocal and causing a latent ambiguity which might be rebutted and removed by extrinsic evidence: *Miller v. Travers*, 8 Bing. 244, 247; *Kean v. Drope*, 35 U. C. R. 415. And as regards the alterations, the first, the correction of the description, would appear to be harmless, inasmuch as it was made with the consent of the parties to the instrument and to carry out their intention at the time of its execution: *Norton on Deeds* (1906), pp. 33, 34, and cases there cited; 2 Cyc. 156, 157; 2 Am. & Eng. Encyc. of Law, 2nd ed., p. 205. And plaintiff could derive no right under the second, even if in form creating a valid condition, because made without consent after the execution and delivery of the deed: *Norton on Deeds*, p. 31. And, even if the effect of the alterations, or one of them, was to destroy the covenants in the deed, yet they cannot operate to reconvey or take away the estate which had once passed by it or to prevent it from being used to shew its operation in its unaltered condition: *Hagar v. O'Neill*, 20 A. R. 198, 216, and cases there cited.

There is no question of the deed having been procured by fraud or fraudulent representations. The defendants are in possession; the plaintiff was bound to prove a better title; and this he has entirely failed to do. The appeal should therefore be allowed and the action dismissed with costs throughout.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, C.J.

MAY 13TH, 1907.

WEEKLY COURT.

RE MOYER.

Will—Construction—Pecuniary Legacies—Specific Bequests—Identification of Moneys—Recourse to General Personal Estate.

Motion under Rule 938 for order declaring the construction of the will of Joseph H. Moyer, dated 14th February, 1898.

E. W. Boyd, for executors.

M. J. McCarron, St. Catharines, for James Moyer and the husband and children of Sarah Fellman.

J. A. Keyes, St. Catharines, for Catharine Moyer individually, and as administratrix of Deborah Moyer.

W. Davidson, for Orval Moyer and Rebecca Moyer.

F. W. Harcourt, for Roy Stauffer and Norah Stauffer.

MEREDITH, C.J.:—The testator by his will appointed executors, whom he directed to pay and discharge all his just debts, funeral and testamentary expenses. After this direction the will contains a bequest to the testator's wife, Catharine Moyer, in these words: "Second. I will, devise, and bequeath to my beloved wife, Catharine Moyer, all my personal property of every nature and kind soever, consisting of notes, bank accounts, lumber, wheat, and all other personal effects, to have and to hold the same to her own use and benefit forever."

He next devised to his son James the homestead farm, "upon the condition that he pays therefor the sum of \$6,000," which sum he directed to be paid as follows: \$1,500 in one year after his death, \$1,000 a year for the next two years thereafter, and the residue of \$2,500 at the death of his wife, with interest on the \$2,500 at the rate of 4 per cent. per annum, payable annually, the interest to be paid to his executors for the benefit and use of his widow, and if the interest, with the interest which he by a subsequent provision of his will directed to be paid by his daughter Sarah Fellman, should prove insufficient for the support and maintenance of his widow, he directed that his son James should pay so much of the principal as with the interest would be sufficient to support and maintain her. He also provided that his son James should allow and permit his widow to use, occupy, and enjoy the house then occupied by her, with the graperies and garden attached to it, and that his son James should also furnish his widow with certain necessities and conveniences for her use.

He then devised to his daughter Sarah Fellman the farm he had purchased from Delos W. Spence, provided she or her assigns should pay to his executors therefor \$4,000, as follows: \$1,000 within one year after his decease, \$750 annually for the next two years, and the residue with interest at the rate of 4 per cent. per annum on or before the death of his wife, and he directed that in the event of the interest not

being sufficient to support his wife, his wife was "to ask" his executors to collect a portion of the principal to support and maintain her from his daughter Sarah as well as from his son James.

Then follow bequests of 4 pecuniary legacies, one of \$950 to his grandson Orval Moyer, one of \$600 to his grandson Roy Stauffer, one of \$600 to his granddaughter Norah Stauffer, and one of \$50 to Rebecca, widow of Noah Moyer; the first 3 to be paid to the respective legatees, if then of age, upon the death of the testator's widow.

He then bequeathed to his daughter Sarah Fellman, James Moyer, and Deborah Moyer, the proceeds of the sale of his two farms devised to James and Sarah, "whether purchased by Sarah Fellman and James Moyer or other parties, share and share alike," after deducting out of the shares of each of them certain specified sums.

Then follow a provision that, in the event of either his son James or his daughter Sarah, or both of them, refusing to accept the farms "at the prices specified by" the testator, the executors should dispose of them and divide the proceeds as he had directed with regard to the moneys to be paid by James and Sarah, and a declaration that the bequest to his widow did not include "the proceeds of the sales" of the farms.

James Moyer accepted the devise of the homestead, but Sarah Fellman refused to accept the devise to her of the Spence farm, which has been sold under the direction of the will.

The testator was not possessed of any real estate other than the homestead and the Spence farm.

The question raised by the motion is as to the source, if any, from which the pecuniary legacies are to be paid.

It is argued upon the one side that the bequest of the personal property to the widow is specific, and that the bequest of the moneys payable by James Moyer and of the proceeds of the sale of the Spence farm is also specific, and that there is, therefore, no fund to which the pecuniary legatees are entitled to resort for payment of their legacies, and on the other side it is contended the the legacies referred to are not specific, and that the pecuniary legacies are payable out of the general personal estate, which it is contended consists of the personalty bequeathed to the widow and the money

payable by James and the proceeds of the sale of the Spence farm.

The contention that the bequests of the moneys payable by James Moyer and of the proceeds of the sale of the Spence farm are specific, is, in my opinion, well founded.

The rule applicable is thus stated in *Roper on Legacies*, p. 200: "If a testator direct his freehold or leasehold estates to be sold, and disposes of the proceeds in such a form as to evince an intention to bequeath them specifically, the testamentary dispositions will be specific, the money is sufficiently identified and severed from his other property, and, since he has sufficiently marked his intent to distribute the identical proceeds, the bequests are accompanied with all the requisites of specific legacies."

An instance of the recognition and application of this rule is to be found in *Page v. Leapingwell*, 18 Ves. 463. . . .

The gift of the \$600 payable by James Moyer and the proceeds of the sale of the Spence farm is a specific legacy within the meaning of this rule, the moneys are bequeathed specifically, they are identified and severed from the other property of the testator, and the intent to distribute the identical moneys is clear.

In *In re Ovey*, *Broadbent v. Barrow*, 20 Ch. D. 676, the Court of Appeal had to consider what is necessary to constitute a specific legacy. Without attempting to give an exhaustive definition of a specific legacy, the Master of the Rolls (Jessel) indicated that, speaking generally, it is necessary to make a legacy specific, that the subject of it be a part of the testator's property, a part emphatically as distinguished from the whole, a severed or distinguished part, and not the whole in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it, and Lindley, L.J., adopted as a working though not an exhaustive definition, of a specific legacy, that it is "a bequest of a specified part of the testator's personal estate which is so distinguished:" p. 684. The case was taken to the House of Lords, and is reported, sub nom. *Robertson v. Broadbent*, 8 App. Cas. 812, and there the Lord Chancellor (Selborne) said that the principle of the exemption of personal estate specifically bequeathed from being applied in payment of pecuniary legacies is that it is necessary to give effect to the intention apparent by the gift, and, referring to the power of

a testator, as against all persons taking benefit under his will, to release a particular chattel forming part of his personal property from liability for his debts, said: "The same principle applies to everything which a testator identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate the fund out of which pecuniary legacies are in the ordinary course payable:" p. 815.

Speaking of this statement, Lord Blackburn said: "I do not know if it were necessary to give a definition of a specific legacy that any would come nearer to my idea than what has just been said by the Lord Chancellor in this case:" p. 820.

The legacy in question in this case, in my opinion, comes clearly within this definition, and is therefore a specific legacy.

The same case determines that such a bequest as that to the testator's widow of his personal estate is not specific.

It follows, therefore, that the pecuniary legatees are entitled to have recourse to the general personal estate bequeathed to the widow, but not to the fund bequeathed to Sarah Fellman, James Moyer, and Deborah Moyer, for the payment of their legacies.

I have no doubt that the meaning I am compelled to give to the language which the testator has used to express his testamentary intentions will defeat his real intention, and I should have been glad, therefore, to have found in the will something which would enable me to hold that that intention had been expressed, but I have found nothing.

There must, therefore, be judgment declaring the true construction of the will to be in accordance with the opinion I have expressed, and the costs of all parties must be paid out of the general personal estate bequeathed to the widow.

BOYD, C.

MAY 13TH, 1907.

TRIAL.

BICKELL v. WOODLEY.

*Way—Private Way—Trespass—Boundary—User — Evidence
—Costs.*

Action to recover possession of a strip of land in the town of Dundas and to restrain defendant from trespassing

thereon and for damages. Counterclaim to establish a right of way, etc.

J. W. Lawrason, Dundas, for plaintiffs.

A. R. Wardell, Dundas, for defendant. •

Boyd, C.:—There appears to be but little accurate evidence of details I think it is well proved that double gates were placed on the 12 or 14 feet in question, upon Matilda street, towards the end of 1894. This was the first time that any opening for entrance upon the property was made at that point. Before that time there had been gates for the use of the brick cottage on the piece of land sold (out of the larger block) to Sutherland in August, 1894. That appears to be the obvious reason of the change, not to afford means of access to the small wooden cottage now owned by defendant, but for convenient or necessary access to the main building, the brick cottage, now owned by plaintiffs. Up to the end of 1894 there had been a fence where the double gates now are, and the occupants of the wooden cottage made use of a small wicket gate to get to the street from the back porch door, while they get in coal or wood either by throwing it over the fence or by using a "chute" (or spout) which Mrs. Graham says was on the street at the front of the wooden cottage. . . .

The only access to the site of the alleged lane from the street began in 1894, and the critical question is, what use was made of this 12 or 14 feet down to the time the wooden cottage was conveyed in April, 1899, to the person under whom defendant claims. . . .

I take it that the place was used as a yard, and that wood and coal were taken into it through the gates intermittently with horse and rig. But there is no evidence of any defined driveway or lane, no beaten road, nothing of a visible or continuous nature to indicate any apparent right.

It is not clear whether Armes's occupation ended in 1893 or 1899, but, even if extending to the later date, it falls short of shewing a right of way enjoyed with or appurtenant to the wooden cottage. There is other evidence . . . to shew that at the time of the purchase by his son (through whom defendant claims) it was supposed that the line bounding the purchase would come some inches into the porch, and the son said he would move the porch, but was prevented from doing so by illness, and he was told at that time that

the 12 or 14 feet were reserved for the use of the brick cottage. This explanation of the situation appears to me to accord better with all the other circumstances than the claim to have the land open to joint user by both tenants.

I find that the true boundary will give two feet more land to defendant than was supposed at the date of purchase, and thereby access will be afforded from the back porch to the wicket gate attached to the wooden cottage, and as for wood and coal, that can be delivered in the same way as was done before the erection of these double gates in 1894.

Success is divided; the claim as to right of way fails, but defendant is entitled to a larger strip of land along the porch than was conceded by plaintiff. The boundary should be defined as according to the line laid down in Mr. Fairchild's plan, and neither party should get costs.

The question of law I do not consider at length, but I have grave doubts whether any right of user over the strip of land would, in the circumstances found, pass to the owner of the wooden cottage either by implication or under the Conveyancing Act, R. S. O. 1897 ch. 119, sec. 12; *Roe v. Siddons*, 22 Q. B. D. 237; *Watts v. Kelson*, L. R. 6 Ch. 173.

MAY 13TH, 1907.

DIVISIONAL COURT.

MARKLE v. SIMPSON BRICK CO.

Negligence—Master and Servant—Injury to and Death of Servant—Action by Widow for Damages—Findings of Jury—Accident—Cause of.

Appeal by plaintiff from judgment of RIDDELL, J., 9 O. W. R. 436.

M. J. O'Reilly, Hamilton, for plaintiff.

G. Lynch-Staunton, K.C., and N. Somerville, for defendants.

THE COURT (MEREDITH, C.J., CLUTE, J., MABEE, J.), dismissed the appeal with costs.

MAY 13TH, 1907.

C.A.

RE KAY AND WHITE SILVER CO.

Land Titles Act—Registration of Cautions—Claims for Compensation—Bona Fides—Terminating Cautions.

Appeal by J. Wilbur Kay from order of MABEE, J., 9 O. W. R. 712.

W. H. Blake, K.C., for appellant.

J. Shilton, for the White Silver Co.

THE COURT (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), dismissed the appeal with costs.

MAY 13TH, 1907.

C.A.

STILL v. HASTINGS.

Malicious Prosecution—Want of Reasonable and Probable Cause—Functions of Judge and Jury—Nonsuit—Setting Aside—New Trial.

Appeal by defendant from order of Divisional Court, 9 O. W. R. 121, 13 O. L. R. 322, setting aside nonsuit and directing a new trial.

E. F. B. Johnston, K.C., for defendant.

D. O'Connell, Peterborough, for plaintiff.

THE COURT (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), dismissed the appeal with costs.

MORSON, JUN. CO. C.J.

MAY 14TH, 1907.

10TH DIVISION COURT, YORK.

REX v. DEVINS.

Sunday—Lord's Day Act—Restaurant-keeper — Supplying Food—Candies and Oranges not Eaten on Premises—Conviction—Appeal.

Appeal by John Devins from a conviction made by one of the police magistrates for the city of Toronto under the old Lord's Day Act, C. S. U. C. 1859 ch. 104, sec. 1, but which, so far as the point involved in this appeal is concerned, differs in no material way from the new Lord's Day Act, 6 Edw. VII. ch. 27, which came into force on 1st March, 1907. Section 1 enacts as follows: "It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or any other person whatsoever, on the Lord's day, to sell or publicly shew forth or expose or offer for sale, or to purchase, any goods, chattels, or other personal property or any real estate whatsoever, or to do or exercise any worldly labour, business, or work of his ordinary calling (conveying travellers or His Majesty's mails by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted.)"

The appeal was taken under sec. 1 of ch. 10 of 4 & 5 Edw. VII., which amended the Criminal Code, 1892, by directing that the appeal, in cases where a fine and not imprisonment was imposed, should be to the Division Court of the division of the county in which the cause of the information or complaint arose, instead of to the Court of General Sessions of the Peace, as formerly.

J. Haverson, K.C., for the defendant.

W. Johnston, for the informant.

MORSON, JUN. CO. C.J.:—The information was laid by Inspector Archibald, of the city morality department, against the appellant as a shop-keeper, and not as a restaurant-keeper, but, at the request of the inspector and on the consent of the appellant, the conviction was made against him as a restaurant-keeper. This was for the purpose of a test case to determine whether the selling of candies and oranges by a

restaurant-keeper on the Lord's day is part of his ordinary calling; if it is, there is no offence under the Lord's Day Act—a restaurant coming within the exception and admittedly a work of necessity.

The conviction is as follows: "That John Devins on the 7th April, 1907, at the city of Toronto, in the county of York, being on the said day a restaurant-keeper, did contrary to law do and exercise worldly labour, business, and work of his ordinary calling as such restaurant-keeper, selling candies and oranges, the said worldly labour, business, and work not being conveying travellers or His Majesty's mail by land or water, selling drugs and medicines, nor other work of necessity or work of charity, contrary to the form of the statute in such case made and provided."

The facts shortly are as follows:—

The appellant is a licensed restaurant-keeper, carrying on business on week days and Sundays at the Sunnyside crossing in the city of Toronto, where he serves, amongst other things, ham and eggs, tea, coffee, sandwiches, and cakes, for light meals, and heavier meals if desired. Some guests eat their meals at the tables, others take them away. The offence for which he was convicted was selling candies and oranges on the Lord's day to several guests who did not eat them in the restaurant.

The appellant now appeals from the conviction, on the ground that the selling was part of his ordinary business of a restaurant-keeper, and therefore no offence under the Act.

It is to be noticed that the appellant in his evidence said he did sell candies and oranges as part of his ordinary business, and was not contradicted. The only question then for my decision is, whether the sale of the candies and oranges by the appellant was in the exercise of his ordinary calling of a restaurant-keeper—and in deciding this, I am deciding the point I was asked to decide as a test case, applicable to all restaurants and eating houses.

It is quite clear, if the appellant kept a candy shop and not a restaurant, the selling of the candies on the Lord's day would be an offence under the Act, a candy shop not being, like a restaurant, a work of necessity, and therefore not exempt.

It appears from the uncontradicted evidence that the appellant was a bona fide restaurant-keeper, and sold, amongst other things, candies and oranges.

In *Regina v. Albertie*, 3 Can. Crim. Cas. 356, 20 C. L. T. Occ. N. 123, it was decided by the late Judge McDougall that ice cream was a food, and the sale of it on Sunday by a restaurant-keeper was not an offence under the Act.

Judge Morgan also decided in *Rex v. Meyers* (unreported) that candies were a food, and the sale of them on Sundays by the restaurant-keeper was part of his ordinary calling, and was not an offence. I agree with both these decisions. It has not been proved that the appellant in this case kept a candy shop, as contended by the respondent, and I must therefore treat him as a restaurant-keeper only, who keeps for sale to his customers, amongst other things, candies and oranges with which to supply their various wants, and it must be the customer and not the appellant who decides what those wants are.

The kind of food each customer may want depends largely on his tastes, his appetite, or perhaps the length of his purse. This being so, and in the absence of any statutory Lord's day bill of fare fixing what kinds of food shall be eaten on the Lord's day, it is surely competent for the customer to choose what he may eat. He may prefer every and all kinds of food the restaurant provides if his appetite so prompts, or only some of them. He may prefer ice cream, as in the *Albertie* case, or candies, as in the *Meyers* case. I do not think he is bound to sit down at a table and eat what we ordinarily understand by a meal, light or heavy. He may, I think, instead of a meal, be allowed to purchase some light food, such as ice cream, oranges, or candies, and take them away if he pleases. In the *Meyers* case Judge Morgan held that candies could be eaten on or off the premises. I do not think it makes any difference in principle that the appellant knew he was selling the candies or oranges for the purpose of being taken away; it cannot change his position of a restaurant-keeper so long as the restaurant is a bona fide one. The respondent admitted on the argument that it would not be an offence if it was ham and eggs the appellant sold, if eaten on the premises, but I fail to see any distinction in principle between ham and eggs and candies and oranges. They are all sold as food, and that candies and oranges are food is undoubted. The late Judge McDougall said in the *Albertie* case, what is applicable here: "Is he (the restaurant-keeper) to be excused from the penalty if he furnishes to one customer a cut from a hot joint, some vegetables, and a

cup of tea and coffee, but is liable to the penalty should he supply to another customer a dish of ice cream and a glass of water or a biscuit and a glass of milk? If it is lawful for an inn-keeper or an eating-house keeper to supply meals on a Sunday, is he bound to catechise his customers and satisfy himself before serving them that they are hungry and need food to refresh them, or must he refuse them any trifling nourishment short of a full-course dinner?"

The case of *Rex v. Sabine*, decided by Judge Winchester, and relied on by the respondent, is easily distinguishable. The appellant Sabine was fined for selling ice cream soda on Sunday, but contended that in so doing he was within the exemption, being a restaurant-keeper. He had, it is true, a restaurant license, but the learned Judge held, on the evidence, that he was a candy shop-keeper and not a bona fide restaurant-keeper, having obtained the license only as a blind to enable him to sell ice cream and ice cream soda on Sundays, and therefore properly dismissed his appeal. The learned Judge said in his judgment: "In the present case I am satisfied that the defendant was not strictly and exclusively carrying on the business of a victualler, but, on the other hand, he was carrying on the business of a candy and ice cream store; that he obtained the victualling house license in order to enable him to sell ice cream soda and ice cream on Sundays during the summer weather." He has not decided that a bona fide restaurant-keeper cannot sell ice cream soda on Sundays.

It was also contended by the respondent that because the candies and oranges were not eaten on the appellant's premises, this made the premises a shop, and therefore the selling of them was an offence, a candy-shop not being, as I have already said, exempt under the Act. I cannot give effect to this contention. To hold that a restaurant is only a place where, according to the common idea, meals alone are served from a bill of fare to be eaten on the premises at tables or counters, would, in my opinion, be too narrow a definition of the word "restaurant" or "eating house." I prefer to hold, in the light of modern progress and requirements, that it is a place where, in addition to such foods as are ordinarily sold, there is also sold ice cream, ice cream soda, candies, oranges, and other things of a like nature, to be eaten either on or off the premises. What difference does it make if they are eaten off the premises? To contend, as the respondent does, that it is no offence if eaten on the premises, but if

eaten off them, it changes the restaurant into a shop and is an offence, seems to me an unsound contention. The offence against the Act is surely in the sale, and not in the eating. It is the restaurant-keeper who offends in selling contrary to the Act, and not the customer in eating.

I can therefore come to no other conclusion, under all the circumstances, than that candies and oranges may be sold on the Lord's day by a bona fide restaurant-keeper as part of his ordinary business or calling, without any penalty, under either the old or new Lord's Day Act, and that the appellant in this case did not commit any offence. In so concluding, I have not lost sight, I trust, of the necessity for the due and proper observance of the Lord's day, and I do not think my conclusion will in any way interfere with it. I agree with what the late Lord Kenyon, C.J., said in *Rex v. Younger*, 5 T. R. 449: "I am for the observance of the Sabbath but not for a pharisaical observance of it."

The conviction will therefore be quashed, but, this being a test case, without costs.

CARTWRIGHT, MASTER.

MAY 15TH, 1907.

CHAMBERS.

KINGSWELL v. McKNIGHT.

*Judgment Debtor—Examination of—Second Examination—
Application for—Rule 900.*

Motion under Rule 900 by plaintiff (judgment creditor) for a second examination of defendant as a judgment debtor.

Britton Osler, for plaintiff.

W. J. Elliott, for defendant.

THE MASTER:—The application is supported only by an affidavit of plaintiff's solicitor that he has been informed by his client and verily believes that "an agreement exists whereby the said defendant is entitled to an interest in a claim known as the 'Nugget Claim.'" The defendant was examined as to this on 11th March last on plaintiff's motion for a receiver. After judgment in the action he was ex-

amined as a judgment debtor on 1st May instant, when this question was again gone into as fully as could be done. On both occasions defendant positively denied having any interest in this or any other property of any kind in this province.

On the authority of Watson's Case, 15 P. R. 427, 16 P. R. 55, I think the motion cannot succeed. There the applicant gave specific reasons for making the motion, but the order of the Master in Chambers for the further examination was reversed by the Chancellor with costs. The present case is not so strong, and there does not appear any reason for supposing that a new examination will be more successful than that taken two weeks ago.

The motion will, therefore, be dismissed with costs to be set off against plaintiff's judgment.

I have not found any case in which a second, not to say a third, examination has been granted under the Rule in question.

RIDDELL, J.

MAY 15TH, 1907.

CHAMBERS.

RE REDMAN.

Devolution of Estates Act—Sale of Land by Administrators—Consent of Official Guardian—Sale Free from Dower—Widow a Lunatic—Necessity for Order—Terms—Payment into Court for Benefit of Widow—Costs.

Application by the administrators of the estate of a deceased person for an order enabling them to convey lands of the deceased free from the dower of the widow.

S. H. Bradford, for the applicants.

F. W. Harcourt, for the widow and her child.

RIDDELL, J.:—The decedent died on 16th December, 1906, intestate, leaving him surviving his widow and one child, 16 years of age. The widow has been for several years in the Mimico asylum, and is insane. Letters of administration have been taken out, and the administrators

are desirous of selling the real estate of the deceased. The official guardian and inspector of prisons and public charities agree that such a sale is proper. The order should be made as asked under the provisions of the Devolution of Estates Act, R. S. O. 1897 ch. 127, sec. 11. The widow is unable to elect under sec. 4 (2). The whole of the purchase money will be paid into Court, and the income of one-third applied for the benefit of the widow until her death or recovery or until further order. It was necessary to come to the Court for an order such as is now directed, sec. 16, as amended by 6 Edw. VII. ch. 23, sec. 3, not enabling the administrators to sell free from dower. The costs, therefore, will be paid out of the estate; but the widow's share should not bear any portion of these costs, as the necessity arose from no act or default of hers.

MAY 15TH, 1907.

DIVISIONAL COURT.

VEZINA v. WILL H. NEWSOME CO.

Foreign Judgment—Judgment Recovered in Circuit Court of Quebec against Company Domiciled in Ontario—Want of Jurisdiction—Nullity—22 Vict. ch. 5, sec. 58 (C.)—Repeal by Subsequent Legislation—Rules of International Law.

Appeal by defendants from order of senior Judge of County Court of York, upon a motion by plaintiff for summary judgment under Rule 603, allowing judgment to be entered for the amount sued for.

The action was brought on a judgment recovered by plaintiff against defendants on 4th October, 1906, in the Circuit Court of the district of Quebec, in the province of Quebec.

A. Cohen, for defendants.

W. E. Raney, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., MABEE, J.), was delivered by

MEREDITH, C.J.:—According to the affidavit of the president of the defendant company, filed upon the motion for judgment, the company, at the time the Quebec action was begun, had no office or agent in the province of Quebec, the company having, as the affidavit states, “sold out its Quebec business on the 1st day of July, 1906.”

The defendant company were incorporated under the Ontario Joint Stock Companies Letters Patent Act, and their head office was and is at Toronto.

In the exemplification of the Quebec judgment the company are described as a body corporate and politic having their head office in Toronto, Ontario, and also a business office in Montreal for the province of Quebec, and the judgment is a default judgment for want of appearance.

Granting that the original cause of action arose in the province of Quebec, the question for decision is whether, assuming the statements in the affidavit of the president of the company to be true—as they must be presumed to be for the purpose of the motion or judgment—is the judgment of the Quebec Court one which should be recognized by the Courts of this province as a judgment binding on defendants?

It was conceded by counsel for plaintiff, and there is no doubt, that, unless jurisdiction was conferred upon the Quebec Court by 22 Vict. ch. 5, sec. 58, and the provisions of that section are still in force, the judgment sued on is in this province a nullity.

The general rule of international jurisprudence applicable is stated by Earl Selborne in delivering the judgment of the Judicial Committee of the Privy Council in *Sirdar Gurdayal v. Rajah of Faridkote*, [1894] A. C. 670, 683, 684, to be that “the plaintiff must sue in the Court to which the defendant is subject at the time of the suit (*actor sequitur forum rei*).” . . .

Court v. Scott, 32 C. P. 148, was relied upon by counsel for plaintiff as taking the case at bar out of the general rule, and giving jurisdiction to the Circuit Court to pronounce a judgment against the appellants which they, though domiciled in this province, were bound to obey, and on the other hand it was contended by counsel for the defendants that the effect of subsequent legislation has been to repeal 22 Vict. ch. 5, sec. 58, upon which *Court v. Scott* was based, as far, at all events, as it affected persons resident in On-

tario, and that Court v. Scott is therefore no longer applicable.

The contention of defendant's counsel that Court v. Scott is no longer applicable is, in my opinion, well founded, if the hypothesis on which that contention is based—that 22 Vict. ch. 5, sec. 58, is no longer in force—is also well founded.

As I understand the judgment in that case, it is determined that the effect of sec. 129 of the British North America Act was to continue in force both as to Ontario and Quebec the provisions of 22 Vict. ch. 5, sec. 58, which were subsequently, with some unimportant verbal changes, incorporated in the Consolidated Statutes of Quebec as sec. 63 of ch. 83, and that therefore persons in Ontario who might under its provisions be served with the writ of summons were under an obligation to submit to the jurisdiction created by these enactments in the Quebec Courts, and were bound to obey judgments obtained against them there in the manner thereby authorized.

It is necessary, and it may be as well at this point, to refer to 23 Vict. ch. 24; by it provision was made that in an action, in either section of the province of Canada, brought on a judgment or decree obtained in the other section, where service of the process was personal, no defence that might have been set up to the original suit could be pleaded (sec. 2), and that where the service was not personal and no defence was made, any defence that might have been set up to the original suit could be made to the action on the judgment or decree (sec. 4), and by sec. 1, a similar provision to that contained in sec. 4 was made applicable to actions upon a foreign judgment or decree described as a judgment or decree not obtained in either section of the province.

The effect of this statute was, as far as it applied to judgments obtained in either of the two provinces when sued on in the other, to take away from the judgment, if service of the summons was not personal, its conclusive character, by enabling the defendant to make any defence to the action on the judgment which might have been set up in the original action.

Before dealing with this branch of the case, and tracing the subsequent legislation in the two provinces, in order to ascertain whether the provisions of 22 Vict. ch. 5, sec.

58, are repealed, it will be well to consider the effect of 23 Vict. ch. 24, sec. 1 of which was repealed by the legislature of Ontario by 39 Vict. ch. 7, sec. 1, schedule B, and secs. 2 and 4 of which now constitute secs. 117 and 118 of ch. 51, R. S. O. 1897, limited, however, in their application to Ontario. Sections 2, 4, and 3 formed secs. 145, 146, and 147 of ch. 50 of R. S. O. 1877 (the Common Law Procedure Act); in R. S. O. 1887, secs. 145 and 146 were re-enacted and constitute secs. 81 and 82 of ch. 44, sec. 147 being dropped, its provisions having been embodied in Con. Rule 270 (1888), which (as sec. 4 of 23 Vict. ch. 24 did) provided for the mode of service on a corporation in an action brought in Ontario on a judgment or decree obtained in Quebec. Sections 81 and 82 were re-enacted by 58 Vict. ch. 12, secs. 122 and 123, and in R. S. O. 1897 these sections appear as secs. 117 and 118. Rule 270 (1888) was abrogated by the Rules of 1897.

Sections 117 and 118 do not, in my opinion, assist plaintiff. They do not expressly, and it is plain, I think, that they do not impliedly, give to a Quebec judgment any greater effect than it is entitled to according to the rules of international law, their purpose being on the contrary to take away from such a judgment sued on in this province, where service of the summons was not personal and no defence was made, its conclusive character.

It may be that the *raison d'être* of 23 Vict. ch. 24 was the legislation contained in 22 Vict. ch. 5, sec. 58, and its effect as to Quebec judgments to modify what otherwise would have been under the earlier statute the conclusive character of judgments obtained under the authority conferred on the Quebec Courts by that enactment, but that for the purpose of the present inquiry is immaterial.

I proceed now to trace the legislation of the two provinces since sec. 58 of 22 Vict. ch. 5 became law.

No notice of the section has been taken in Ontario since Confederation, and in the Consolidated Statutes of Upper Canada it does not appear, nor is it mentioned in the schedule of repealed Acts.

In the Consolidated Statutes of Lower Canada, the section appears as 63 of ch. 83.

Under the authority of ch. 2 of the Consolidated Statutes commissioners were appointed to codify the laws in civil matters of Lower Canada, and 29 & 30 Vict. ch. 25 was

passed adopting a Code of Civil Procedure, the work of the Commissioners, which was to be brought into force by proclamation, and which came into force on 28th June, 1867.

Section 63 without any substantial change forms article 69 of this Code.

In 1875, by 38 Vict. ch. 9, article 69 was amended by extending its provisions to the Dominion of Canada, and by making some change in the mode of proving service of the writ of summons.

In 1888 the statutes of Quebec were revised, and by article 5867, article 69 of the Civil Code of Procedure, as amended by 38 Vict. ch. 9, was with some unimportant verbal changes re-enacted.

By 53 Vict. ch. 55, sec. 3, article 69, as contained in article 5867 of the Revised Statutes of Quebec, was amended.

By 57 Vict. ch. 9, provision was made for a revision of the Civil Code of Procedure by commissioners to be appointed, who were to be charged with that work.

By 60 Vict. ch. 48, a draft Code submitted by the commissioners, with certain amendments adopted by the Legislative Assembly, was adopted, and provision was made for bringing this new Code into force by proclamation, and it came into force by proclamation on 1st September, 1897: Quebec Official Gazette, vol. 29, p. 1292.

Article 69 (article 5867, R. S. Q.), as amended by 53 Vict. ch. 55, sec. 3, forms article 137 of the new Code, but there is omitted from it all reference to the cause of action having arisen in the province of Quebec, and the authority to the Judge or prothonotary to grant leave to serve the writ at the domicile or ordinary residence of the defendant in another province of Canada, appears, from the incorporation in article 137 of certain provisions of article 136, to apply to all cases where a defendant who is absent from the province of Quebec has no domicile, ordinary residence, or place of business in that province.

What then is the effect of the legislation in the two provinces since Confederation? In considering this question, it must be borne in mind that sec. 58 of 22 Vict. ch. 5, forms part of an Act intituled "An Act to amend the Judicature Act of Lower Canada," and that the recital of the Act is "that it is desirable further to amend the laws in force in Lower Canada relative to the administration of justice;" from which it follows that, as after Confederation it was

competent for the legislature of Quebec to make such changes in the laws relating to the administration of justice, which is by the British North America Act subject to the legislative authority of the provinces, as to that legislature might seem proper, it was open to the legislature of Quebec to repeal the provisions of sec. 58, including so much of them as, according to the view of the Court in *Court v. Scott*, imposed upon persons domiciled in Ontario the obligation to submit to the jurisdiction created in the Courts of Quebec, and to obey judgments obtained against them there in the manner authorized by the section.

The result of the legislation in Quebec since Confederation, and especially of that giving effect to the present Code of Civil Procedure (60 Vict. ch. 48, by sec. 10 of which all provisions of law inconsistent with that Act were repealed), is, in my opinion, to repeal the provisions of sec. 58, to the extent, at all events, of putting an end to the obligation to which I have referred, where, apart from the provisions of that section, and according to the rules of international law, the Courts of Quebec would not have had jurisdiction to pronounce a judgment binding on the defendant, when sought to be enforced by action in this province.

The repeal is of laws inconsistent with the provisions of the Act, and by article 1 of the new Code the laws concerning procedure and the rules of practice in force at the time of its coming into force were abrogated in all cases in which the new Code contains any provision having expressly or impliedly that effect, and in all cases in which the former laws or rules are contrary to or inconsistent with any provision of the new Code, or in which express provision is made by the new Code upon the particular matter to which the former laws or rules related.

By the new Code, express provision is made upon the particular matter to which article 69 of the former Code related, viz., the granting of leave to serve the writ of summons, where the defendant has his domicile or ordinary residence in another province of Canada, and it appears to me that the effect of 60 Vict. ch. 48, sec. 10, and article 1 of the new Code, is, therefore, to abrogate article 69 of the former Code.

The binding effect of the judgment sued on must therefore depend upon the rules of international law, and the defendants not having been domiciled or resident in Quebec when

served with the writ of summons, the judgment must be treated in the Courts of this province as a nullity.

I need hardly add that for the purpose of the application of the rules of international law, it is well settled that the province of Quebec is to be treated by the Courts of this province as a foreign country.

In coming to this conclusion it is satisfactory to feel that I am not denying to the Courts of Quebec a jurisdiction which they assert, for, according to the exemplification of the judgment, it contains on the face of it a statement which, if true, would have given to the Circuit Court jurisdiction, viz., that the defendants had at the time the action was begun in that Court a place of business at Montreal, in the province of Quebec.

I do not regret the conclusion to which I have come, for, if the decision in *Court v. Scott* were to be applied, it would lead to the anomalous and unsatisfactory result that residents of Ontario are bound by judgments of the Quebec Courts, when, under like circumstances, the judgments of the Court of this province would in Quebec be treated as nullities.

In my opinion, plaintiff's motion for judgment should have been refused, and the appeal should therefore be allowed with costs, and, in lieu of the judgment directed to be entered in the Court below, an order should be made dismissing the motion for judgment with costs. Were it not that plaintiff may desire to amend by suing on his original cause of action, I would direct judgment to be entered dismissing the action with costs.

CARTWRIGHT, MASTER.

MAY 16TH, 1907.

CHAMBERS.

JOHNSTON v. TAPP.

Notice of Trial—Late Service of—Motion to Set aside—Failure of Applicant to Negative Service of Proper Notice.

Motion by defendant to set aside notice of trial as served too late.

Featherston Aylesworth, for defendant.

J. M. McEvoy, London, for plaintiff.

THE MASTER:—The 10th May was the last day for service of notice of trial for the non-jury sittings at London commencing on 20th May. The notice in question was served after 4 p.m. on the 10th, though defendant's solicitor had been told earlier in the day that such notice would be given There was no admission of service given. The defendant at once served a jury notice, and moved to set aside the notice of trial for the non-jury sittings.

It is admitted that under Rules 344 and 538 (b) this notice was too late; but the affidavits in support of the motion do not negative the service upon defendant's solicitor of a regular and proper notice, which was said by Spragge, C., in *Scott v. Burnham*, 3 Ch. Ch. at p. 403, to be necessary. The present case is very similar in its facts to *Wright v. Way*, 8 P. R. 328, where *Scott v. Burnham* was followed and approved by Blake, V.-C. Unless these cases can be distinguished or have been overruled, they are binding on me. So far as I can see, they are binding. They are cited in *Holmsted & Langton*, 3rd ed., pp. 569, 747, as existing authorities. *Bodine v. Howe*, 1 O. L. R. 208, and *McLaughlin v. Mayhew*, 5 O. L. R. 114, 2 O. W. R. 10, shew how similar cases are dealt with.

Plaintiff's jury notice will probably have the effect of preventing a trial at the non-jury sittings in any case. It would seem, however, that plaintiff can avoid any delay by availing himself of sec. 92 (1) of the Judicature Act, as the County Court sittings with jury will commence on 11th June.

The motion is therefore dismissed without costs. . . .

[Reversed by TEETZEL, J., 17th May, 1907.]

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MAY 25TH, 1907).

VOL. X.

TORONTO, MAY 30, 1907.

NO. 2

MAY 10TH, 1907.

DIVISIONAL COURT.

HACKETT v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Findings of Jury—Infant—Dismissal of Action.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiff, upon the findings of a jury, for the recovery of \$1,225.

The action was brought on behalf of Gordon F. Hackett, an infant, by William J. Hackett, his father and next friend. On 3rd July, 1906, Gordon F. Hackett was stealing a ride on one of the cars of defendants, sitting upon the bar behind the car, which was going in an easterly direction on Gerrard street. When the boy had got to his destination, he jumped off the bar, but continued running with the car, being carried by the impetus of it. Without looking he attempted to cross the tracks towards the north part of the street, when a west-bound car, going in an opposite direction to the one he had just got off, passed the east-bound car, and in collision with it the boy lost a leg.

The following were the questions put to the jury and their answers:—

1. Was the injury to the plaintiff Gordon Hackett caused by any negligence or unlawful act of the defendants?
A. Yes.

2. If so, wherein did such negligence or unlawful act consist? A. By conductor on east-bound car not being on

rear of his car, considering distance plaintiff rode, and putting same off, as he should have done. Also motorman on car causing accident not ringing gong and not having proper look-out.

3. Or was the injury to Gordon Hackett caused by reason of his own negligence? A. No, considering the speed boy acquired by getting off east-bound car and that he was going across street.

4. Or could Gordon Hackett by the exercise of reasonable care have avoided the accident?

5. What is the amount of compensation which ought to be awarded to the plaintiff Gordon Hackett, if he is entitled to recover? A. \$1,000, and all his medical expenses pertaining to trial, \$1,225.

H. H. Dewart, K.C., for defendants.

John MacGregor and E. A. Forster, for plaintiff.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., MAGEE, J.), was delivered by

MEREDITH, C.J.:—We think that no purpose would be served by taking further time to consider this case. It has been very fully discussed, and the evidence has been referred to. We think that upon the whole evidence there was nothing upon which the jury could reasonably find that the injury to the boy was caused by the negligence of defendants. There was evidence, we think, that could not have been withdrawn from the jury, of defendants' omission to perform a duty, the breach of which plaintiff alleges, and that the omission constituted negligence, but that is not enough to entitle plaintiff to recover. It must be shewn that that negligence was the effective cause of the injury to the boy.

The circumstances of the case were that the boy was a trespasser upon the property of the company; he was stealing a ride, sitting upon the bar behind the car, which was going in the opposite direction to the one which came in contact with him. Getting near to the place where he intended to go, he got off the car, and after, as he says, for a distance of 10 paces running with the car holding on to some portion of it, he started diagonally across the highway and the tracks, and while doing so a car coming in the opposite direction struck and seriously injured him.

According to the strongest testimony, as I understand it, in favour of plaintiff, he was, at the time he started to go across the track, only 10 feet away from the car that ran him down. He had then to cross the track and the devil strip, and got, it is said, upon the other track—which would probably be a distance of two and a half feet; the car was going at the rate of 7 or 8 miles an hour, and he was running fast.

Now it seems to me it would be most unjust, under such circumstances, to fasten upon the motorman a breach of duty because, in such an emergency, the boy coming out suddenly from a place where he was not expected to be, he did not see and immediately apply the proper remedy. The man had but two eyes; of course he had to keep a proper look-out, but the occurrence happened in possibly the fraction of an instant, and to say that the motorman was guilty of negligence and his employers are liable because, in circumstances such as existed in this case, he did not see the boy and did not apply the remedy, would be, I think, practically to make the defendants insurers against any accident that happens.

The plaintiff contends that the proper inference is that if the motorman had been on the look-out he would have seen the boy and have tripped the fender and so avoided the accident. I think it would be mere speculation in this case to say that the tripping of the fender would have had any such effect.

It is suggested that if the gong had been rung the boy would have been warned, and either would not have got off the drawbar, or, if he had got off, would have looked out for the car, but his own evidence is against that view. He gave his evidence very frankly, and his testimony was that the noise was such that if the gong had been rung he did not think he would have heard it; and his own evidence is that he ran so fast that he could not stop, and that he did not look.

We think, on the evidence, that if anybody was to blame it was the unfortunate boy himself, and, although it is a deplorable accident, it is one for which defendants ought not to be made liable.

It is manifest that the jury were struggling—whether against their consciences or not it is difficult to say—to find a verdict for the plaintiff upon some ground or other. It

seems an extraordinary finding that when asked as to contributory negligence they say there was no contributory negligence, in effect, because the boy was running so fast and crossing the street; the very thing that probably would be thought to amount to negligence is that which, according to the jury, excuses the negligence.

Then it is said that the principle of *Lynch v. Nurdin*, 1 Q. B. 29, applies, and that the boy is of such tender years that negligence is not to be attributed to him. That case has no further application than this: that where the child is of such tender years as not to appreciate the danger of what he does, contributory negligence cannot be attributed to him. That is the full extent of the doctrine of that case, and the cases that follow it. In this case, I do not think that *Lynch v. Nurdin* applies, because the boy was not of that type; he was a bright, intelligent boy, and it is not age but intelligence that is the test in applying the principle of that case.

I think the appeal must be allowed, and judgment must be entered dismissing the action.

BRITTON, J.

MAY 18TH, 1907.

WEEKLY COURT.

CRAIG v. KINCH.

*Receiver—Action Brought by Receiver in his own Name—
Seizure of Property in Hands of Receiver — Injunction —
Damages—Bank—Lien—Timber—Bank Act — Practice —
Costs.*

Motion by plaintiff to continue an injunction, and motion by defendants the Quebec Bank to validate a seizure made by them.

C. A. Masten and R. B. Henderson, for plaintiff.

D. T. Symons, for defendants the Quebec Bank.

BRITTON, J.:—By consent of parties the motion to continue injunction was to be treated as a motion for judgment.

The seizure by the Quebec Bank as against the receiver in possession of property claimed by the bank ought not to have been made. The rights of the bank were protected

and could be asserted in the suit of Diehl v. Carritt, in which suit the plaintiff was appointed receiver. The plaintiff is an officer of the Court, and as to the matters in question is subject to the Court's discretion. In that suit the plaintiff—receiver—took possession, as expressly stated in the order, "without prejudice to a certain agreement dated the 14th day of September, 1906," to which agreement the Imperial Paper Mills of Canada Limited, the Quebec Bank, and others, were parties. That agreement made express provision, amongst other things, for the advance of money by the Quebec Bank for the purchase of spruce and jack pine, to be manufactured by the paper mills company, and for the payment of certain wages of employees of said company, and that agreement specially recognized, as between all the parties thereto, any special lien or privilege that the Quebec Bank had or might have under sec. 74 of the Bank Act to certain product and property of said mill—so that the plaintiff was quite right in protecting said property for the benefit of all concerned in the suit in which he was appointed receiver, but the plaintiff had not any right of action in his own name as receiver. This point was not fully argued before me. My impression on the argument was that the plaintiff had brought this action by leave of the Court. All that I find in the material before me is that upon the examination of plaintiff he was asked, "Have you the order directing the bringing of this action?" The plaintiff did not answer, but the solicitor, Mr. Henderson, stated: "We did not get out any formal order, but we saw the Judge before we issued our writ, and got leave to bring an action, and when we issued our writ, he gave the order granting the injunction."

If leave was properly applied for, and formally given, I assume it was for the receiver to bring an action in the name of the Imperial Paper Mills Limited, and not in his own name. There is no cause of action in the plaintiff as receiver. No damage has been sustained by the plaintiff as receiver or otherwise, by reason of the seizure by the Quebec Bank, and no damage has been sustained by the company.

The Quebec Bank are now proceeding, and as I think in the proper way, by motion in the suit of Diehl v. Carritt, for an order for possession of their property held by the receiver. That motion stands until after the report of a referee is made, as to what securities the Quebec Bank hold upon property, and specifying the property in possession

of the receiver. What has been done in this action and the seizure by the Quebec Bank should now be cleared out of the way. The action will be dismissed without costs, and the motion of the Quebec Bank to validate the seizure complained of will be dismissed without costs. The present seizure, in reference to which the action was brought, if maintained, is to be abandoned—all without prejudice to the rights of the Quebec Bank upon any securities they hold as to any property in the hands of the receiver, or as against the property of the Imperial Paper Mills Company, or as to any liens or rights or claim of said bank—and the said bank may pursue their remedies for recovery of the same as if this action had not been instituted.

I find that no damage was sustained by the Quebec Bank by reason of the injunction in favour of plaintiff, and that there will be no liability on the part of the plaintiff as receiver or otherwise upon his undertaking given upon obtaining the injunction.

The undertaking of the plaintiff given in Court on 9th January last is to stand in full force in favour of the Quebec Bank as to any logs used by the plaintiff or by the Imperial Paper Mills of Canada Limited, and in all respects.

These proceedings are not to be considered as determining or attempting to determine the rights of any of the parties under any agreement, or upon any security or anything that may be in controversy in the suit of Diehl v. Carritt.

Action and motion dismissed without costs.

CARTWRIGHT, MASTER.

MAY 20TH, 1907.

CHAMBERS.

McKAY v. NIPISSING MINING CO.

*Pleading—Statement of Claim—Time for Delivery—Rule 243
(b)—Several Defendants Appearing at Different Times.*

Motion by two of the defendants to set aside the statement of claim as irregular under Rule 243 (b).

A. M. Stewart, for applicants.

Grayson Smith, for plaintiff.

THE MASTER:—In this case there are 9 defendants, and the motion is made by 2 of them. The only material in support is an affidavit of defendants' solicitor stating that his clients appeared on 18th December, and that the statement of claim was served on 8th May instant. This is not denied. But it was stated that there was an unavoidable delay in serving some of the other defendants, and that the statement of claim had not been delivered after the expiration of 3 months from the last appearance. The plaintiff therefore argued that he was not in any default, and that this must be proved.

It was contended on the other side that the words of the Rule were imperative, and that in every case where there is more than one defendant, each should be served with the statement of claim within 3 months of his appearance unless an order has been obtained extending the time.

The inconvenience and useless expense which would result from such a practice are obvious. In any case I think the principle of *Foley v. Lee*, 12 P. R. 371, applies, and the practice has always proceeded in this view.

The defendants clearly could not successfully have moved to dismiss for want of prosecution, and I do not think they are in any better position in the present attempt.

The motion seems to me useless and not supported by any evidence. There should at least have been an affidavit proving the plaintiff in default as to all the defendants. Costs must be to plaintiff in any event.

MAY 20TH, 1907.

DIVISIONAL COURT.

RE ISA MINING CO. AND FRANCEY.

Mines and Minerals — Mines Act — Application for Working Permit — Invalidity — Affidavit of Applicant — Adverse Claims — Knowledge of Applicant — Order of Mining Commissioner Cancelling Application — Want of Jurisdiction.

Appeal by the Isa Mining Company from an order of the Mining Commissioner, dated 18th December, 1906, declaring that working permit application No. 147 by the

company on the north-east quarter of the north half of lot 11 in the 1st concession of the township of Bucke, was invalid and should be cancelled, and directing that the company should pay the costs of W. B. Francey, the applicant, of the application for cancellation.

G. T. Blackstock, K.C., and G. H. Sedgewick, for the company.

J. M. Ferguson, for W. B. Francey.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., CLUTE, J.), was delivered by

MEREDITH, C.J.:—I agree with the Mining Commissioner that the conditions prescribed by sec. 141 (11) of the Mines Act were not complied with by the company, and that their application was therefore invalid, and should not have been received by the Mining Recorder. Clause 11 requires that the application shall be supported by evidence that the applicant has no knowledge and had never heard of any adverse claim by reason of prior discovery or otherwise. This evidence is to be furnished by the affidavit of the applicant: form 6.

The affidavit which accompanied the application was not in accordance with the requirements of the enactment, and not only did not negative the matters required to be negatived, but shewed that there were adverse claims, and the knowledge of the applicant of the existence of them.

I am of opinion, however, that the Mining Commissioner had not jurisdiction to make the order complained of. I do not find such a jurisdiction conferred on him by any provision of the Act. Section 52, upon which the Commissioner relies, has, in my opinion, no application, because the appellate jurisdiction conferred by the section is with reference to a matter upon which the Mining Recorder has adjudicated, and there was no adjudication by him as to the validity of the application. even if the Recorder had had any judicial function to perform in reference to the filing of the application or its remaining on the files, which I think he had not.

I would allow the appeal and reverse the order appealed from. but would not give costs to either party.

MAY 20TH, 1907.

DIVISIONAL COURT.

SIMPSON v. TORONTO AND YORK RADIAL R. W. CO.

Street Railway — Injury to Passenger—Negligence—Contributory Negligence—Passenger Projecting Body beyond Car —Injury from Striking Post—Question for Jury—Damages—Costs.

Appeal by defendants from judgment of MABEE, J., of 14th February, 1907, in favour of plaintiff for \$500 damages, upon the findings of a jury, in an action for negligence.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

T. C. Robinette, K.C., and C. A. Moss, for defendants.

J. T. Loftus, for plaintiff.

BRITTON, J.:—Plaintiff's allegation is that on 4th September, 1905, he boarded a car of defendants at Long Branch for Toronto, and, as the car was crowded and he wished to smoke, he stood on the rear platform of the car. He leaned back over the wire gate of the car, which was quite low, and in so doing was struck by a post belonging to defendants and used by them for their trolley wire: . . .

I have reached the conclusion that upon the whole case there was evidence of negligence on the part of defendants proper to be submitted to the jury, and that the nonsuit asked for was properly refused.

Upon the evidence the jury could find that plaintiff's injury was sustained by his head coming in contact with a trolley pole. A pole placed by defendants in such close proximity to the rails upon their line of railway that a person standing upon the rear platform and projecting his head as would naturally be done, and as plaintiff says he did, for the purpose of spitting, could be injured by that pole, is dangerous, and so placing it is evidence of negligence.

Plaintiff's evidence is that the car was not crowded, nor was the rear platform crowded. Plaintiff stood upon the platform because he wished to do so. Defendants permitted this, and permitted smoking by passengers when there, and defendants did not permit smoking by passengers on some seats in the car, and they prohibited spitting upon the floor.

of the car. That being the case, if the poles are so near to the cars as to be dangerous, defendants should by a wire netting or in some way so protect or warn passengers as to prevent such an accident as happened in this case.

The case was wholly for the jury unless it can be held, as a matter of law, that what plaintiff did was per se contributory negligence. I do not think it was. Leaning over the rail and looking out, extending one's head or arm or any part of the body beyond the car in motion, may be evidence of contributory negligence, and under certain circumstances would be contributory negligence.

I cannot go so far as to agree with the decision in *Todd v. Old Colony and M. R. Co.*, 3 Allen (Mass.) 18, to which we were referred.

In *Spencer v. Milwaukee, etc., R. Co.*, 17 Wis. 503 (Viles & Bryant's Notes), it was held not error for a Circuit Court to refuse to instruct the jury that if plaintiff was sitting with his elbow or arm projecting out of the window and sustained the injury complained of by reason of that fact, he could not recover. . . .

[Reference to *Francis v. New York Steam Co.*, 1 N. Y. St. Repr. 261; *Holbrook v. Utica and Schenectady R. Co.*, 12 N. Y. 244.]

The defendants were, no doubt, taken at a disadvantage by plaintiff having changed the location of the accident from that given by him upon his examination for discovery, but that was rather a ground for postponement of the trial than ground for a new trial.

As to damages, no doubt the jury estimated them very liberally as against these defendants, but the amount cannot be considered so unreasonable or so excessive as to afford ground for a new trial as of right.

In view of the fact of the place of accident not having been correctly stated by plaintiff in his examination for discovery, and the amount of the damages being large for the injury actually sustained, I think the appeal should be dismissed without costs.

FALCONBRIDGE, C.J.:—There is only one point in the case, viz., whether a passenger is disentitled to recover by reason of contributory negligence for an injury caused through having any part of his body projected beyond the outside edge of the structure of the car in which he is being conveyed.

The point has not arisen in England or in Ontario. The authorities in the United States are in conflict.

My brother Riddell has carefully exploited the leading American cases. After collating and considering these, the only matter which has weighed on my mind to "give us pause" is the dictum of Mr. Beven (*Negligence*, 2nd ed., vol. 2, p. 1204) that "in England . . . there is no reason to doubt that the Massachusetts rule would be adopted." It is with great diffidence that one ventures to dissent from the opinion of so eminent an authority. But we have all come to the conclusion that the Massachusetts rule ought not to be adopted here, and that the question is one for the jury.

The appeal will be dismissed, but without costs for the reasons given by my brother Britton.

RIDDELL, J., arrived at the same conclusion. In his written opinion he referred to the following authorities: *Elliott on Railways*, sec. 1633; *Todd v. Old Colony and M. R. Co.*, 80 Am. Dec. 49, 3 Allen 18; *Beven on Negligence*, 2nd ed., p. 1204; *Bridges v. Jackson Electric R. Co.*, 38 So. Repr. 788, 39 Am. & Eng. R. R. Cas. 512; *Favre v. Louisville and N. R. Co.*, 16 S. W. Repr. 370, 91 Ky. 541; *Huber v. Cedar Rapids and M. C. R. Co.*, 35 Am. & Eng. R. R. Cas. N. S. 768, 100 N. W. Repr. 478; *I. and C. R. Co. v. Rutherford*, 29 Ind. 82; *Pittsville and C. R. Co. v. Andrews*, 39 Md. 329; *Spencer v. Milwaukee, etc., R. Co.*, 17 Wis. 487 (503); *Christensten v. Metropolitan Street R. Co.*, 137 Fed. Repr. 708, 41 Am. & Eng. R. R. Cas. 1250; *Keith v. Ottawa and New York R. W. Co.*, 5 O. L. R. 116; *Fitzpatrick v. Casselman*, 29 U. C. R. 5; *Regina v. Frick*, 16 C. P. 379; *Dougherty v. Williams*, 32 U. C. R. 215; *Scougall v. Stapleton*, 12 O. R. 206.

TEETZEL, J.

MAY 22ND, 1907.

CHAMBERS.

REX v. HARRISON.

Criminal Law — Habeas Corpus — Conviction by Court of Record.

Motion for discharge of prisoner on the return of a habeas corpus.

F. W. Griffiths, Niagara Falls, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

TEETZEL, J.:—I think the prisoner should be remanded to gaol for sentence, on the ground that the writ should not have been issued in the first instance, because it would appear that the writ is not properly issuable, under the Act respecting habeas corpus, R. S. O. 1897 ch. 83, sec. 1, where the prisoner is in custody by virtue of a conviction or order of a court of record: *Regina v. St. Denis*, 8 P. R. 16; *Regina v. Murray*, 28 O. R. 549.

In this case the prisoner is in custody under a conviction of the County Judge's Criminal Court for the county of York, which is constituted a court of record by R. S. O. 1897 ch. 57.

The case of *The Queen v. Smith*, 3 Can. Crim. Cas. 467, cited by counsel for the prisoner, was a judgment upon a case reserved by the trial Judge for the opinion of the Court, and is of no assistance to me on what appears to be a fatal objection to the writ in the first instance. It appears to me that the prisoner's only remedy would be by way of review on a reserved case, and I understand this relief has already been refused to him.

BOYD, C.

MAY 22ND, 1907.

TRIAL.

PARKER v. TAIN.

Ejectment—Mesne Profits—Defence—Claim of Ownership—Trust—Statute of Frauds—Voluntary Conveyance—Improvements—Costs.

Action to recover possession of land and for mesne profits.

W. J. Tremear, for plaintiff.

W. Proudfoot, K.C., for defendants.

BOYD, C.:—This litigation is of most lamentable character, deplorable in every aspect. Nothing can be done in the way of legal relief for the most suffering litigant—nor

do I see any way in which the Court can work out satisfactory results. The claim of the girl (one of the defendants) who was betrayed, beguiled, and deserted, to be declared the owner of the house as against her betrayer (one of the defendants) and his mother (the plaintiff), cannot be established in view of the Statute of Frauds. There is no writing whatever to base a trust, and the conveyance to the mother, even if voluntary, would oust that claim. On the other hand, I do not see my way clear to hold that the deed to the mother was of an entirely voluntary character. I am inclined to think that some money passed; how much is in doubt; but the onus is on the girl to establish fraud as against creditors. The transfer to the mother does not appear to have been to protect the property as against the son's creditors. (None are shewn to have existed at the date of the deed.) The transaction was rather to propitiate the mother and get rid of the importunity of the betrayed girl, who had become distasteful to the author of all this misery. The man was acting with double intent—to make his mother safe and satisfied and to keep the girl quiet by letting her enjoy the possession and rents of the house. I do not think she should be called upon to give an account of them, as she has disbursed much out of them and has also turned her personal service and labour into money for the payment of the mortgage and the improvement of the house. She cannot longer keep possession and must now give way to the legal title of the mother. Judgment will be for delivery of possession by the defendant Hindes, and the defendant Tain must henceforth pay rent of that part of the house he holds, under the lease sanctioned by Hugh Parker, to the plaintiff, Mrs. Parker, and yield up possession of the rooms not included in that lease.

The judgment will be without costs to any one unless the mother wishes to claim her costs against the son, who is responsible for all the mischief of this unsatisfactory litigation.

CARTWRIGHT, MASTER.

MAY 23RD, 1907.

CHAMBERS.

FLORENCE MINING CO. v. COBALT LAKE MINING CO.

Trial—Postponement—Action to Recover Possession of Mining Lands—Act of Provincial Legislature Passed Pendente Lite Validating Title of Defendants—Petition for Disallowance—Grounds for Postponement.

Motion by plaintiffs to stay the trial of this action, wherein they sought to recover 20 acres of land covered by the waters of Cobalt lake.

J. M. Clark, K.C., for plaintiffs.

Britton Osler, for defendants.

THE MASTER:—The whole of the land covered by the water of Cobalt lake was on 20th or 21st December, 1906, sold to certain persons by the Ontario Government for \$1,085,000, which has all been paid, and on 27th December the said land was conveyed to the defendant company for \$3,635,000, and a patent was issued to them.

The present action was begun on 29th December, 1906. The statement of defence was delivered on 6th February, 1907, and nothing has since been done in the way of going to trial.

On 20th April, 1907, an Act was passed by the Ontario legislature, 7 Edw. VII. ch. 15, which, after reciting that it was desirable that no question should be raised as to the right of the Crown to sell Cobalt lake and Kerr lake and the lands covered by the waters thereof, and that the title of the purchasers should be confirmed, enacted and declared that "the said lands and all mining rights therein and thereto are declared to be vested in the said purchasers respectively as and from the dates of the said sales absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location," etc.

Plaintiffs, within a few days of the passing of this Act, petitioned the Governor-General in council to exercise the authority in these matters vested in him by the B. N. A.

Act and disallow the Act of the provincial legislature, on the grounds that it confiscates their vested rights, that it intercepts their pending action; that it is not a legislative Act authorized by the B. N. A. Act; and (besides other grounds) that it was passed on erroneous assumptions and allegations as to the facts; and finally that it is a violation of the provisions of Magna Charta that no one's property shall be taken from him except by due process of law. . . .

The principal authorities referred to were: judgment of Lord Watson in *Dobie v. Temporalities Board*, 7 App. Cas. 136, 151; *Reynolds v. Attorney-General for Nova Scotia*, [1896] A. C. 240, 27 N. S. R. 184; and the judgment of Lord Herschell in *Attorney-General for Canada v. Attorneys-General for the Provinces*, [1898] A. C. 700, 718.

It was strongly contended that the *prima facie* probability or even possibility of the Act complained of being disallowed was a reason why the trial should be postponed until the decision of the Governor-General should be given, or the year within which the right of disallowance must be exercised has expired.

The present case is one in which the plaintiffs have practically tied the defendants' hands and nullified the patents issued to them and confirmed expressly by the Act of last session. On the general principle no delay should be allowed, as shewn by such cases as *Finnegan v. Keenan*, 7 P. R. 385, and *McTaggart v. Toothe*, 10 P. R. 261. It is, therefore, indisputable that the onus is emphatically on plaintiffs to make out a case for postponement. In my opinion, no such ground is shewn.

It is no part of my duty to speculate as to what the Governor-General may do. If any expression of opinion is allowable, it would seem unlikely that such an Act would have been passed by the Ontario legislature unless it had been considered that it was well within their power, and that all necessary provision was made for compensation by sec. 2, which expressly enacts that "all discoveries and claims, if any, made or arising prior to such sales shall be dealt with by the Lieutenant-Governor in council as he may think fit."

The statement of defence denies the allegations of prior discovery by Green, through whom plaintiffs claim. It also alleges that the Attorney-General for this province is a necessary party to the action, which is not properly consti-

tuted without him. There is also a denial of any transfer from Green to plaintiffs of any right or claim he had.

These are questions which must be decided even if the Act should be disallowed. The decision on these points may be adverse to plaintiffs, so that the Act may never come into question at all.

After consideration, it seems more equitable that the action should proceed to trial, leaving it to the trial Judge to deal with the matter as may seem best when it comes before him.

An opinion may, perhaps, be hazarded that on the facts of this case the Governor-General in council might prefer that the question between the parties should go to trial, as, if the plaintiffs fail on the facts, it would be unnecessary to consider the propriety of disallowance.

The motion will, therefore, be dismissed with costs in the cause.

CARTWRIGHT, MASTER.

MAY 23RD, 1907.

CHAMBERS.

TINSLEY v. TORONTO R. W. CO.

*Discovery—Examination of Servants of Defendant Company
—Examination of Conductor — Application for Leave to
Examine Motorman — Special Grounds — Admissions—
Evidence.*

Motion by plaintiff for an order permitting him to examine for discovery a motorman in the service of defendants after the examination of the conductor of the same car, in an action for damages for personal injuries occasioned to plaintiff by the alleged negligence of these men in the operation of the car.

J. H. Denton, for plaintiff.

D. L. McCarthy, for defendants.

THE MASTER:—The conductor states by necessary implication that the motorman was more or less under the influence of liquor, and, in his opinion, which he communicated to his superior, Greene, it was questionable whether

he was fit to handle the car by which plaintiff was admittedly injured very seriously. . . . It was stated that what was desired was to get an admission from the motorman that he was under the influence of liquor at the time of the accident.

This, however, does not seem any sufficient reason for making the order asked. Nothing said either by the conductor or the motorman can be given in evidence against defendants. The condition of the motorman must be proved affirmatively if it is a fact material to plaintiff's case. His admissions would not be sufficient. If he were called as a witness, what he said on examination for discovery might be made use of on cross-examination or to discredit him if he were called by plaintiff and proved hostile.

But, in view of what the conductor has said as to his own opinion, as shewn by his conversations with Greene and Patton about the motorman's condition and what he told him as to having had liquor that night (or early morning), coupled with counsel's own statement of the information he has, it does not seem that any advantage would be gained by allowing the examination of the motorman, when his evidence could not be used against the company.

Motion dismissed; costs to defendants in the cause.

MAY 23RD, 1907.

DIVISIONAL COURT.

BARTRAM v. WAGNER.

Executor—Action for Account of Documents and Property of Testator—Right of Action—Evidence—Fiduciary Relationship—Trover.

Appeal by plaintiff from judgment of MEREDITH, C.J.,
9 O. W. R. 448.

The appeal was heard by BOYD, C., ANGLIN, J., MAGEE, J.

Plaintiff in person.

E. H. Johnston, London, for defendant.

ANGLIN, J.:—Plaintiff sues as executor of Charles Augustus Oscar Van Wagner, who died on 14th October, 1904. Defendant is the widow of deceased. Plaintiff claims "an account of the private papers, personal effects, and other property of the deceased which came into the possession of the defendant."

It is not alleged that defendant stands in a fiduciary relation of any sort to plaintiff. I cannot understand upon what basis plaintiff should be entitled to a general account from her. He alleges that she came into possession of property of her deceased husband, but, except possibly by the merest scintilla of evidence, he fails to adduce any proof of this allegation. He speaks of certain pictures, curios, and books which he knew the deceased formerly had, and he thinks Mr. Wagner owned the furniture, but of this he knows nothing positively. He also refers to some jewelry which, it is said, was pawned. He further says that upon inquiry from defendant she told him that her husband had destroyed all his papers, and that he had left nothing at all. At the close of his evidence he says: "I want to get information. That is all I want. If there is nothing coming, then I will be satisfied. If there is no estate, then I want to know it. If there is any estate, then I want it as executor."

I find nothing in the evidence which could possibly serve to support a claim of trover; nothing which would establish that defendant is in the position of an executrix de son tort; nothing in fact to shew that she is in possession of any property forming part of the estate of her deceased husband.

For these reasons, as well as those given by the Chief Justice of the Common Pleas, I think this appeal fails and should be dismissed with costs. This will be without prejudice to any further action which plaintiff may be advised to bring, after proper demand and upon additional evidence, to recover possession of any property of his testator which may be in the hands of defendant.

MAGEE, J.:—I agree.

BOYD, C.:—There is some evidence in this case that the widow of the testator is in possession of some property belonging to the deceased which is detained from the executor, and as to this she is a constructive trustee for the executor proper, who may sue her as executrix de son tort, and she is

liable to be called to account for the property of the deceased in her hands: *Hill v. Curtis*, L. R. 1 Eq. 90, 101; see also *Judicature Act*, sec. 26 (5).

There was enough, though of slender extent, proved to direct an account to be taken by the Master; further directions and costs reserved. . . ;

Appeal dismissed; BOYD, C., dissenting.

TEETZEL, J.

MAY 25TH, 1907.

WEEKLY COURT.

TORONTO GENERAL TRUSTS CORPORATION v.
HARDY.

*Will—Construction—Joint Stock Companies—Dividends—
Income—Revenues—Accumulation—Capital.*

Motion by plaintiffs for judgment upon the pleadings in an action for the construction of the will of George T. Fulford, deceased.

E. T. Malone, K.C., for plaintiffs.

W. Nesbitt, K.C., and F. W. Harcourt, for the defendant George T. Fulford, an infant.

I. F. Hellmuth, K.C., for the other infant defendants, the grandchildren of the testator.

H. S. Osler, K.C., and Frank McCarthy, for the adult defendants.

TEETZEL, J.:—The only matter for decision is whether the dividends upon the stock in the W. T. Hanson Co. and the Fulford-Hanson Co. form part of the income of the testator's estate, within the meaning of paragraph 18 of the will, or whether such dividends form part of the revenues and income of the testator's business of dealing in proprietary medicines, to be accumulated and invested as part of the capital of his estate, under paragraph 20 of the will.

The testator was sole owner of a very large business in dealing in proprietary medicines, conducted by him personally under the trade name of "The Dr. Williams Medi-

cine Company," in Canada, and in many foreign countries, but not including the United States of America, Mexico, and South America; the business of dealing in the same proprietary medicines throughout the United States and Mexico was owned by the W. T. Hanson Co.; while the Fulford-Hanson Co. controlled the same kind of business for South America; these two were joint stock companies organized under the laws of the State of New York, and the testator owned one-half of the stock in each company.

In paragraph 4 the testator authorizes the executors to keep any investments he may have at his decease, and also authorizes them to hold any increased stock received by way of stock dividends or similar additions to his holdings.

The 3 paragraphs of the will which particularly involve the question under consideration are 5, 18, and 20, which read as follows:—

"5. I desire my executors to continue my business of dealing in proprietary medicines, employing the profits and proceeds of the business (but not the capital or income of my investments) for such purpose and employing such agents and managers as are necessary, but I direct that the said business shall be formed into a joint stock company or companies as soon as possible after my death in order to insure the permanence thereof; and I wish that the name of G. T. Fulford should form part of the name of all such companies, and I give my executors full powers to form such company or companies, including, if they shall see fit, power to allow other persons to subscribe for part of the stock and power to sell stock, but always retaining the controlling interest and capitalizing on the basis of the average yearly profits for the preceding 3 years, being 15 per cent. on the capital."

"18. I direct that as each child attains the age of 25 years his or her income from my estate is to be during the 10-year period of accumulation hereinafter provided for, his or her proportionate part of 90 per cent. of the income of my estate after all charges are paid (excluding always as hereinafter directed the income of my business), it being my intention that my children are to share equally in such income, but until each child attains the age of 25 years what would have been his or her share is to accumulate and form part of my general estate."

" 20. I direct that the revenues and income from my said business, whether in the form of a joint stock company or companies or otherwise, shall not be paid over as part of the income of my estate, but that the surplus income of said business after making all proper allowances and provisions shall be accumulated from year to year and invested and form part of the capital of my estate from which the income to be paid over under this will is to be derived."

Taking the will as a whole with particular reference to these paragraphs and also to paragraph 4, it is quite clear that in the directions given to his executors the testator's intention was to draw a sharp distinction between his business of dealing in proprietary medicines, with its profits and proceeds, and the capital and income of his other investments, and the language of the will is quite appropriate to make that intention effectual.

The provisions of paragraph 5 furnish the key to what he meant by the words "income of my business" in paragraph 18, and the words "revenues and income from my said business" and "surplus income of my said business" in paragraph 20.

I think it is impossible to assume that when in paragraph 5 he expressed the desire for his executors to continue his "business of dealing in proprietary medicines, employing the profits and proceeds of the business," etc., and in directing that "the said business" should be formed into a joint stock company, he contemplated including in that desire and direction the shares held by him in the two New York corporations, and it is, I think, equally clear that he did not intend to embrace those shares as any part of his "business" in his references to the income thereof in paragraphs 18 and 20.

The judgment of the Court will therefore be that the dividends received by plaintiffs from the W. T. Hanson Co. and the Fulford-Hanson Co. form part of the income of the testator's estate, within the meaning of paragraph 18, and do not form part of the revenues and income from the proprietary medicines business of the testator to be accumulated and invested as part of the capital of his estate under the provisions of paragraph 20.

Costs of all parties out of the estate.

BRITTON, J.

MAY 25TH, 1907.

WEEKLY COURT.

RE HALLIDAY AND CITY OF OTTAWA.

Municipal Corporations—Ontario Shops Regulation Act—Early Closing By-law Affecting Class of Traders—Time for Passing—Application of Members of Class—Majority—Computation—Certificate of Clerk of Municipality—Withdrawal of Names of Applicants—Quashing By-law—Costs.

Motion by one Halliday to quash a by-law passed by the council of the city of Ottawa, under and by virtue of the Ontario Shops Regulation Act, R. S. O. 1897 ch. 257, providing for the early closing by grocers of their shops in the city.

R. G. Code, Ottawa, for applicant.

T. McVeity, Ottawa, for the city corporation.

BRITTON, J.:—The by-law could be passed only upon the application of three-fourths in number of the occupiers of shops of this class within the municipality. Upon receipt of such an application it became the duty of the city council within one month to pass a by-law giving effect to it, and requiring all shops of the class specified to be closed during the period of the year and at the time and hours mentioned. In this case the application was received by the finance committee of the city, and was by that committee sent to the city clerk. This application consisted of 6 parts, and was signed in all by 145 persons. The application is not quite correct in form, as it requests the closing of the shops in question every day throughout the year at 6 o'clock, and does not in terms say "every day except Saturdays and days immediately preceding Dominion statutory holidays and the days from 20th to 31st December inclusive." These exceptions were manifestly intended by the signers, and the by-law as passed makes the exceptions. I merely mention this in passing. Nothing turns upon it now.

By statute the time of the receipt or presentation of the petition or application shall be the time when received by

the clerk. This application was received by the clerk on 1st February, 1907. Applications for such by-laws in Ottawa are dealt with under their by-law No. 829. The city clerk satisfied himself that there were, on 1st February, 178 occupant grocers in Ottawa, and that these applications . . . were signed by over three-fourths of such occupants of the class mentioned, and that all the formalities required by by-law No. 829 had been complied with, and on 15th February he so certified, and returned to the finance committee the petition with his certificate and with declarations that had been furnished to him.

The by-law in question was read a first time on 4th March, a second time on 18th March, and a third time and finally passed on 2nd April, 1907.

The objections to the by-law . . . are the following:—

First, that it was not passed within a month after presentation of the application or petition.

That time is, in my opinion, directory. The council, if they intend to act upon such a petition, should do so within the time prescribed, and, if they do not, the petitioners may have something to say about it. I do not give effect to that objection.

Second, that before the passing of this by-law certain of the petitioners had withdrawn their names, so that at the time of its passing there were not three-fourths of the occupants doing business as grocers in Ottawa in favour of it.

In the analysis I am able to make on the material before me, I find that there were only 175 of this class doing business in Ottawa. But, for the present, assume that the number is 178; three-fourths would be 134. The clerk found as signers 146, an excess of 12 over the required majority. There were in fact only 145 signers. On one sheet the number is called 54—there are only 53 in fact. The city clerk says that before this by-law got its first reading there were 57 withdrawals. If these 57 had the right to withdraw, there were left at the time the by-law got its first reading only 88 favouring it—much less than the required three-fourths. If these persons who had changed their minds had the right to do so before the council assumed to act, then there was not before the council the properly signed petition or application when the by-law was even read a first time, or when it was finally passed.

It is contrary to the letter and spirit of the law that class legislation like this should be passed unless clearly desired at the time of passing by three-fourths of those engaged in the business to be restricted. The dealers are not the only persons affected. The smaller consumers are interested. It is a matter of considerable inconvenience to such to have the grocery store closed at 6. . . Many families depend upon the corner grocery for small and frequent supplies. The men of the house, many of them, do not get home from work until 6. The wife is, perhaps, without help, busy about the evening meal, and cannot conveniently go for her supplies until 6.30 or 7 o'clock. If some grocers are willing to keep their stores open for the convenience of such purchasers, they should be permitted to do so, unless it is the clear wish of the three-fourths of those engaged in the same business that the closing by-law should pass. This restriction upon the right of the minority must be imposed only when strictly in accordance with the statute.

I am of opinion that those seeking to withdraw from the application before the by-law was read a first time had the right to do so, and, as their desire was then properly before the council, the by-law was in fact pressed without the necessary sanction of the required majority, and so is bad and should be quashed.

That the wish of the requisite majority is the main thing is emphasized by sub-sec. 8 of sec. 44 of the Shops Regulation Act. It was made clearly to appear to the council, at the time of passing the by-law not attacked, that more than one-third in number of the occupiers of grocer shops in Ottawa were opposed to it. There were 2 petitions against it: one received on 9th March signed by 27 occupiers; one received on 11th March signed by 24; there were the withdrawals received on 1st March, 57: in all 108 opposed. One-third of the total number of occupiers is 60, so there are more by 48 than one-third of the entire number of occupiers.

In the view I take of the section under which this by-law was passed, it is not at all the same as a petition for local improvement or for drainage, where property is to be benefited by the expenditure of money, and for which property is to be assessed. In such cases there is a quasi-contract. In this case I do not think *Gibson v. Township of North Easthope*, 21 A. R. 504, 24 S. C. R. 707, applies.

The third objection is, that, apart from the question of withdrawals, the application itself was not sufficiently signed.

The clerk found in the business 178; three-fourths of 178 would be 134; the names on the application were 145; the clerk struck off as having signed twice and for reasons satisfactory to him 4, leaving 141. It has been shewn that, in addition to the 4, 11 names should not be there, as follows:—

Not in business as grocers when application signed	2
Not grocers at all	2
Additional names as disclosed in affidavits filed	7

11

Taking these from the 141, only 130 will remain or 4 less than the majority number required.

If the two not in business when the application was signed were included in the 178, the result would be: total, 178; off, 2; leaving 176; three-quarters of 176 would be 132; so in that case there are 2 short of the number required.

I must assume that those not grocers at all whose names are on the application as grocers were not counted by the city clerk as part of the 178.

There was not the requisite three-fourths majority of those of the grocer class required to warrant the passing of the by-law.

It was argued that upon a motion to quash the work of the city clerk must be taken as final. I do not agree with this. The council must be satisfied that such application is signed by not less than three-fourths in number of the occupiers, etc. The application must in fact be so signed. Prima facie what the clerk did was quite sufficient to warrant the action of the council, but when affirmatively shewn, as I think it may be shewn on a motion to quash, that the requisite three-fourths did not in fact sign, then there was absence of jurisdiction, and the by-law is bad. See *Robertson v. Township of North Easthope*, 16 A. R. at p. 214.

The by-law must be quashed with costs, which I fix at \$50. As this is in the main a contest between members of the grocer class, the city may well be relieved of a portion of the costs of this litigation.

It is contrary to the letter and spirit of the law that class legislation like this should be passed unless clearly desired at the time of passing by three-fourths of those engaged in the business to be restricted. The dealers are not the only persons affected. The smaller consumers are interested. It is a matter of considerable inconvenience to such to have the grocery store closed at 6. . . Many families depend upon the corner grocery for small and frequent supplies. The men of the house, many of them, do not get home from work until 6. The wife is, perhaps, without help, busy about the evening meal, and cannot conveniently go for her supplies until 6.30 or 7 o'clock. If some grocers are willing to keep their stores open for the convenience of such purchasers, they should be permitted to do so, unless it is the clear wish of the three-fourths of those engaged in the same business that the closing by-law should pass. This restriction upon the right of the minority must be imposed only when strictly in accordance with the statute.

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That the wish of the requisite majority is the main thing is emphasized by sub-sec. 8 of sec. 44 of the Shops Regulation Act. It was made clearly to appear to the council, at the time of passing the by-law not attacked, that more than one-third in number of the occupiers of grocer shops in Ottawa were opposed to it. There were 2 petitions against it: one received on 9th March signed by 27 occupiers; one received on 11th March signed by 24; there were the withdrawals received on 1st March, 57: in all 108 opposed. One-third of the total number of occupiers is 60, so there are more by 48 than one-third of the entire number of occupiers.

In the view I take of the section under which this by-law was passed, it is not at all the same as a petition for local improvement or for drainage, where property is to be benefited by the expenditure of money, and for which property is to be assessed. In such cases there is a quasi-contract. In this case I do not think *Gibson v. Township of North Easthope*, 21 A. R. 504, 24 S. C. R. 707, applies.

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That the wish of the requisite majority is the main thing is emphasized by sub-sec. 8 of sec. 44 of the Shops Regulation Act. It was made clearly to appear to the council, at the time of passing the by-law not attacked, that more than one-third in number of the occupiers of grocer shops in Ottawa were opposed to it. There were 2 petitions against it: one received on 9th March signed by 27 occupiers; one received on 11th March signed by 24; there were the withdrawals received on 1st March, 57: in all 108 opposed. One-third of the total number of occupiers is 60, so there are more by 48 than one-third of the entire number of occupiers.

In the view I take of the section under which this by-law was passed, it is not at all the same as a petition for local improvement or for drainage, where property is to be benefited by the expenditure of money, and for which property is to be assessed. In such cases there is a quasi-contract. In this case I do not think *Gibson v. Township of North Easthope*, 21 A. R. 504, 24 S. C. R. 707, applies.

The third objection is, that, apart from the question of withdrawals, the application itself was not sufficiently signed.

The clerk found in the business 178; three-fourths of 178 would be 134; the names on the application were 145; the clerk struck off as having signed twice and for reasons satisfactory to him 4, leaving 141. It has been shewn that, in addition to the 4, 11 names should not be there, as follows:—

Not in business as grocers when application signed	2
Not grocers at all	2
Additional names as disclosed in affidavits filed	7

11

Taking these from the 141, only 130 will remain or 4 less than the majority number required.

If the two not in business when the application was signed were included in the 178, the result would be: total, 178; off, 2; leaving 176; three-quarters of 176 would be 132; so in that case there are 2 short of the number required.

I must assume that those not grocers at all whose names are on the application as grocers were not counted by the city clerk as part of the 178.

There was not the requisite three-fourths majority of those of the grocer class required to warrant the passing of the by-law.

It was argued that upon a motion to quash the work of the city clerk must be taken as final. I do not agree with this. The council must be satisfied that such application is signed by not less than three-fourths in number of the occupiers, etc. The application must in fact be so signed. Prima facie what the clerk did was quite sufficient to warrant the action of the council, but when affirmatively shewn, as I think it may be shewn on a motion to quash, that the requisite three-fourths did not in fact sign, then there was absence of jurisdiction, and the by-law is bad. See *Robertson v. Township of North Easthope*, 16 A. R. at p. 214.

The by-law must be quashed with costs, which I fix at \$50. As this is in the main a contest between members of the grocer class, the city may well be relieved of a portion of the costs of this litigation.

ANGLIN, J.

MAY 25TH, 1907.

CHAMBERS.

RE WILLIAMS AND ANCIENT ORDER OF UNITED WORKMEN.

*Life Insurance—Benefit Society—Change of Beneficiary—
Rules of Society—Wife of Member—Foreign Divorce—
Validity — Estoppel — Remarriage — Claim of Second
Wife—Claim of Adopted Daughter—Right to Contest.*

Application by Catherine Williams for payment out of Court of the proceeds of an insurance policy on the life of the late Daniel Williams. —

J. E. Jones, for Catherine Williams.

G. Grant, for Mary Jane Williams.

M. C. Cameron, for Jennie Fairbanks.

ANGLIN, J.:—The deceased, Daniel Williams, was married in 1860 to Mary Jane Williams at Springfield, Mass., and continued to reside in that State with her until January, 1886, when, because of his becoming amenable to the criminal law, he was obliged to quit Massachusetts, and came to this province, where he established his permanent residence. His wife remained in Massachusetts, and apparently thenceforward supported herself.

In October, 1890, Mary Jane Williams took proceedings in the Superior Court for the county of Worcester, in the State of Massachusetts, for divorce a vinculo, upon the ground of desertion and cruelty. Daniel Williams not appearing in this proceeding, the Court on 6th May, 1891, granted to the applicant a decree of divorce nisi, which became absolute by judgment of the Court pronounced upon 6th November, 1891.

In 1896 the deceased Daniel Williams went through a ceremony of marriage with the claimant Catherine Williams, and continued to live with her as his wife down to the time of his death.

In December, 1889, Daniel Williams became insured with the Ancient Order of United Workmen for the sum of \$2,000, payable to his then wife, Mary Jane Williams, and he continued to maintain this insurance in force in her

favour until 1896, when he indorsed upon the beneficiary certificate a revocation of the direction for payment to Mary Jane Williams, and made application for a duplicate certificate to be issued for the same sum payable to "Catherine Williams (formerly Corbett), bearing the relationship to him of wife, \$1,500, and to Jennie Fairbanks, daughter of Maggie Fairbanks, bearing the relationship to him of adopted child or dependent, \$500." The application for change of direction stated that the first wife was dead. A duplicate certificate was issued to the applicant in accordance with this application, on 14th July, 1897. The insurance was maintained in this position until the death of Daniel Williams—his reputed wife, Catherine Williams, paying the premiums for several years before his decease, amounting in all to \$347.24.

Mary Jane Williams now makes claim to the proceeds of this insurance paid into Court by the Ancient Order of United Workmen, alleging that she is the lawful widow of Daniel Williams, deceased, and that she was never lawfully divorced from him, asserting that the Massachusetts Court had no jurisdiction, because, at the time of the institution of the proceedings for divorce, the domicile of her husband was in this province, and also that there had been in fact no desertion of her by her husband, and that there was no ground for the granting of a divorce. The applicant, Catherine Williams, on the other hand, asserts that she is the lawful widow of the deceased, asserting that the divorce granted by the Massachusetts Court was valid and that she was lawfully married.

She also claims the whole of the proceeds of the policy, notwithstanding the nomination of Jennie Fairbanks as a beneficiary, asserting that such nomination is contrary to the rules and constitution of the Ancient Order of United Workmen. Jennie Fairbanks, on the other hand, claims the sum of \$500 appointed to her, alleging that she was an adopted child of the deceased, Daniel Williams, and dependent upon him.

The validity for all purposes of the decree of divorce obtained by Mary J. Williams depends upon some very interesting considerations of international law. Since the decision of the Privy Council in *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, it is recognized in all Courts administering English law that "the permanent domicile of the

spouses within the territory is necessary to give the Courts jurisdiction to divorce a vinculo, so that its decree to that effect shall, by the general law of nations, possess extra-territorial authority." For the purposes of divorce jurisdiction the domicile of the married pair is that of the husband: *Warrender v. Warrender*, 2 Cl. & F. 488, 528; *Magurn v. Magurn*, 11 A. R. 178.

In the present instance it is common ground that the domicile of the late Daniel Williams, at the time the Massachusetts divorce was obtained, was in the province of Ontario. But on behalf of Mary J. Williams it is contended that, inasmuch as, at the time the alleged desertion took place, she was domiciled with her husband in the State of Massachusetts, he would not be allowed to assert for the purposes of her suit for divorce that he had ceased to be domiciled in Massachusetts, and therefore that the Massachusetts Court had jurisdiction to pronounce a decree in her favour which would command extra-territorial recognition. In support of this proposition Mr. Jones cites the judgment of Gorell Barnes, J., in *Armytage v. Armytage*, [1898] P. 178, at p. 185. . . .

The statement of Gorell Barnes, J., as to jurisdiction to dissolve marriage is distinctly obiter. The jurisdiction to decree judicial separation, the equivalent of the former divorce a mensa et thoro, the English Court of Probate and Divorce inherited from the former Ecclesiastical Courts, which always possessed and exercised it.

In *Le Mesurier v. Le Mesurier*, at p. 531, Lord Watson says: "It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage."

Notwithstanding the passage referred to in the judgment of Gorell Barnes, J., in *Armytage v. Armytage*, and its adoption by Westlake in his work on Private International Law, 4th ed., at p. 86, I cannot but think it doubtful whether a decree of divorce, granted under circumstances such as we have in this case, is entitled to recognition outside the State in the Courts of which it was obtained. But it is unnecessary in the present case to determine this interesting question, because, whatever may be the effect of the Massachusetts decree as to others, the claimant Mary J. Wil-

liams, who obtained the divorce, cannot be heard to impugn the jurisdiction which she invoked: *Swaizie v. Swaizie*, 31 O. R. 324, 330. Neither can she be heard to allege that the desertion, which she set up and proved to the satisfaction of the Massachusetts Court, was a mere fiction. Upon this ground the claim of Mary J. Williams must be rejected.

Nor does it seem necessary to determine whether Catherine Williams was lawfully married to the late Daniel Williams. The Ancient Order of United Workmen have not disputed their liability upon the insurance certificate. In seeking to pay the proceeds of the certificate into Court they merely asked to be relieved of the responsibility of determining to which of the claimants the money belonged. Upon the face of the policy it is made payable to Catherine Williams and Jennie Fairbanks. It would have been open to the Ancient Order of United Workmen, if so advised, to challenge the right of Catherine Williams and Jennie Fairbanks to any portion of the money, upon the ground that they were not persons to whom, under the rules and constitution of the association, the deceased could make insurance moneys payable. The Order has not seen fit to raise any such question, and I do not understand how it can be raised by Mary J. Williams. For the same reason I am of opinion that Catherine Williams cannot be heard to dispute the right of Jennie Fairbanks to the portion appointed to her, upon the ground which she puts forward, namely, that Jennie Fairbanks was not an adopted child of Daniel Williams, deceased, nor dependent upon him. The rule of the Order in force when the beneficiary certificate issued provided that a member might name as his beneficiary "his adopted daughter or adopted son if dependent upon the member, but satisfactory proof must be furnished to the Grand Lodge to establish that fact, and also that such dependency will likely exist on the maturity of the certificate." Of the existence of the facts of adoption, dependency, and probable future dependency, the Grand Lodge is constituted the sole judge, and its judgment must be formed at the time the certificate is obtained, and once so formed is conclusive upon all parties, and, in the absence of fraud, upon the Grand Lodge itself as well. Catherine Williams could not, in any event, claim under the appointment to herself more than the \$1,500 apportioned to her by the deceased, and,

in my opinion, she is not in a position to contest the right of Jennie Fairbanks to the \$500 appointed to her.

The order will be for payment of the costs of Catherine Williams and Jennie Fairbanks out of the sum of \$1,500 appointed to Catherine Williams, and for payment of the balance of such sum of \$1,500 to Catherine Williams. The sum of \$500 will be retained in Court and paid with accrued interest to Jennie Fairbanks upon her attaining majority.

GORHAM, Co. C.J.

APRIL 6TH, 1907.

THIRD DIVISION COURT, HALTON.

FRASER v. McGIBBON.

Innkeeper—Liability for Effects of Guest—Commencement of Relationship—Negligence—Notice—Special Place Provided for Leaving Effects.

Plaintiff claimed from defendant, an hotelkeeper, the sum of \$20, being the alleged value of an overcoat, gloves, and other articles of clothing lost at defendant's hotel when plaintiff was, as he alleged, a guest, on or about 2nd October, 1906, owing to the alleged default of defendant. Defendant disputed plaintiff's claim in full.

Plaintiff in person.

W. A. F. Campbell, Georgetown, for defendant.

GORHAM, Co. C.J.:—The facts, as given in evidence, appear to be as follows. The Esquesing township agricultural fair was held on the 2nd October, 1906, at Georgetown. The plaintiff on the morning of that day travelled by railway train from Milton, his place of residence, to Georgetown, for the purpose of attending the fair. Defendant appears to have been for a number of years, and in particular on that day, proprietor of the hotel, in Georgetown, known as the Clark House, and to have therein carried on the business of an innkeeper. Plaintiff reached defendant's hotel between the hours of 9 and 10 in the morning. He says that when he entered the hotel he intended to enter his name in the hotel register, a book kept on the office counter for that purpose, but, owing to being inter-

rupted or turned from his intention by meeting some friend, failed to do so. He, shortly after his entry into the hotel, took off his overcoat, in the pockets of which were his gloves and a handkerchief, and hung it up where he had been in the habit of hanging his coat when he stopped at this hotel and where he saw others who were on that day, he says, guests at the hotel, hang their coats. He did not ask any one to take charge of his coat, nor call the attention of any one to it. Defendant on cross-examination admitted that others hung their coats where plaintiff hung his, and that he knew this. Defendant's hotel was on that day thronged, and he had, on account of the large crowd that usually gathers at his hotel on such days, provided a cloak room and a man in charge of same, who received coats, etc., from guests and gave "checks" for same. He also put up a notice or notices in the public sitting room that such a room had been provided. The notice read "check room inside." Plaintiff says he did not see this notice, nor did he know there was such a room and man in charge, and that, had he known, he would have put his coat in that room and taken a check. Defendant admits that he did not tell plaintiff there was such a room until plaintiff told him of the loss of his coat, when defendant for the first time learned that plaintiff had brought an overcoat into the hotel. There appears to be a notice at the top of each page in the hotel register book to the effect that the proprietor will not be responsible for coats, etc., unless "checked." Plaintiff says he did not see this notice and knew nothing of it. Plaintiff remained, after hanging up his coat as mentioned, about the hotel until noon, when he had dinner, for which he paid on coming from the dining-room. Then after dinner he went to the fair grounds, and in the evening returned to the hotel and had another meal, for which he also paid on leaving the dining room. He then remained about the hotel until he was ready to start for home, when he, for the first time since he had hung up his coat in the hotel, looked for it where he had hung it. It could not be found, and has never since been found. The plaintiff by this action seeks to recover \$20 as damages for the loss of the coat, gloves, and handkerchief.

The law to be considered in this class of cases is very old. Some Judges and text writers find great similarities between the civil law and the common law, but at the same

time shew great dissimilarities. Others do not hesitate to say the law applicable is the "law and custom of England" without reference to the civil law—that it is peculiar to the English law. This law and custom of England—the common law—originally imposed upon an innkeeper certain liabilities to prevent him from acting in collusion with the bad characters who in old times infested the roads, and to protect wayfarers and travellers who on their journeys brought goods into the inn. The wayfaring guest had no means of knowing the neighbourhood or the character of those whom he met at the inn. It was therefore thought right to cast the duty of protecting the guests upon the host. Knowing that this is one of his duties, one of the liabilities he incurs, the innkeeper can make such charge for the entertainment of his guest as will compensate him for the risk. It may be observed that, unless the law cast upon him this burden, a dishonest innkeeper might be tempted to take advantage of a wealthy traveller. With that view the innkeeper was placed in the position of an insurer of the goods of his guest, and correlative to his liability is his right of lien upon the goods which the guest brings with him into the inn.

The innkeeper must be the keeper of a common inn, that is, one who makes it his business to entertain wayfarers, travellers, and passengers, and provide lodgings and necessaries for them, their horses and attendants, and receive compensation therefor. He must admit and entertain to the extent of his accommodation all persons of the class for whose entertainment he holds out his house and against whom no reasonable objection can be shewn. He may exclude such as are not sober, orderly, able to pay his reasonable charges, or such as ply his guests with solicitations for patronage in their business, or whose filthy condition would annoy other guests. It appears that he may limit his accommodation and entertainment to a certain class. Persons other than guests are said *prima facie* to have the right to enter an inn without making themselves trespassers; for there is an implied license for the public to enter, though such license is in its nature revocable and those thus entering become trespassers when they refuse to depart when requested. An innkeeper by opening his house—his inn—offers it to the use of the public as such, and thereupon the common law imposes on him certain duties

and gives him certain rights. Those duties and rights, as well as the attendant liabilities, have been changed, in some respects made heavier and in some respects made lighter, by statute. In the province of Ontario the statutes bearing directly on these duties, rights, and liabilities, are the Liquor License Act and the Act respecting innkeepers. That an innkeeper may not be licensed under the Liquor License Act does not change the character of the business of him who entertains travellers, etc. The possession of such a license does not make, nor the want of it prevent, a person from being an innkeeper at common law. It is his business alone that fixes the status of a person in this respect. A license saves the innkeeper from the liability to certain penalties imposed by the Act, but neither the possession nor the want of it will save him from liability to his guests. Here it may be noted that "inn" and "hotel" are synonymous. Ordinarily in Ontario "tavern" is also used synonymously with "inn;" in England it appears to signify a house where food and drink without lodgings may be obtained. To those who may be curious about the origin of those words and the origin of the business of hotel-keeping, I would recommend the careful reading of *Cromwell v. Stephens*, 2 Daly (N. Y. C. P.) 15.

It is necessary to consider who is a guest and at what point of time the relation of innkeeper or landlord and guest arises. A guest is one who resorts to and is received at an inn for the purpose of obtaining the accommodation which it purports to afford. He may be a wayfarer, traveller, or passenger who stops at or patronizes an inn as such. He may come from a distance, or live in the immediate vicinity. He comes for a more or less temporary stay, without any bargain for time, remains without one and may go when he pleases, paying only for the actual entertainment received. His stay and entertainment may be of the most transient kind. One who goes casually to an inn and eats or drinks or sleeps there, is a guest, although not a traveller: *York v. Grindstone*, 1 Salk. 388; *Bennett v. Mellor*, 5 T. R. 273; *Orchard v. Bush*, [1898] 2 Q. B. 284; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560. And a person continues a guest though he goes to view the town for any time, or to view any spectacle in the town: *Gelley v. Clerk*, Cro. Jac. 188; *McDonald v. Edgerton*, *supra*; or goes out and says he will

return at night: *White's Case*, Dyer 158 b. The liability of the innkeeper as such will continue during the temporary absence of the guest: *Day v. Bather*, 2 H. & C. 14. Note the following cases: *Brown Hotel Co. v. Buckhardt*, 13 Colo. App. 59; *Grinnell v. Cook*, 3 Hill (N. Y.) 485; *McDaniels v. Robinson*, 26 Vt. 316. If the relation of landlord and guest be once established, the presumption is that it continues until a change of that relation is shewn: *Whiting v. Mills*, 7 U. C. R. 450.

"It is important to ascertain when the relation of innkeeper and guest commences, in cases involving liability for the loss of or injury to the guest's effects. This is a question of fact, the solution of which generally depends on the facts of each case. It is obvious that when a person goes to an inn as a traveller or wayfarer, and the innkeeper receives him as such, the relation of landlord and guest attaches at once. The intention to avail himself of the entertainment, that is, to obtain refreshments, or lodging, or both, is material, and if the party should engage and pay for a room merely to secure a safe place for the deposit of his valuables, or without any intention of occupying it, he would not be a guest. Under some circumstances too, the relation may commence before the party actually reaches the inn:" *Am. & Eng. Encyc. of Law*, vol. 16, p. 520.

In the United States it has been decided that when a traveller arrives at a station, and is met by the porter of an hotel, and the traveller delivers to the porter his baggage or the check for getting the same from the railway authorities, the traveller is thereby so far constituted a guest as to render the proprietor liable for the safe-keeping or re-delivery of the baggage. The liability of the proprietor, it is said, commences from the time of the delivery of the baggage or check to the porter: *Coskery v. Nagle*, 20 Am. St. R. 333; *Sasseen v. Clark*, 37 Ga. 242; *Williams v. Moore*, 69 Ill. App. 618; *Eden v. Drey*, 75 Ill. App. 102.

In England and Ontario there being, so far as I can ascertain, no direct authority on the point as to the moment of the commencement of the relation of landlord and guest, one may, I think, infer from the reasoning in the arguments of counsel and in the judgments in the reported cases that, as the innkeeper is under an obligation at common law to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him

in the inn, and no good reason for refusing him, the relation commences the moment the person presents himself and is accepted. While the presenting of himself must be a positive act on the part of the would-be guest, the acceptance on the part of the innkeeper need not be; in fact the mere want of active objection on the part of the innkeeper to the person so presenting himself, may be taken as evidence that the innkeeper has accepted him as guest. So that, if a person goes to an inn as a wayfarer or traveller with the intention of becoming a guest, which intention may be evidenced only by the act of the person in so presenting himself, and the innkeeper does not actively object to or refuse him at once, it may well be that he, on the very moment of such presentation and non-objection, becomes the accepted guest of the landlord at his inn, and then the relation of landlord and guest, with all its rights and liabilities, is instantly established between them.

The relation of innkeeper and guest having been established, it becomes the duty of the innkeeper to keep such goods as the guest brings with him into the inn safely night and day. And this although the guest does not deliver his goods to the innkeeper or his servant, nor acquaint him with them: *Calye's Case*, 8 Coke 32, 1 Sm. L. C., 10th ed., p. 115. This, it has been said, is necessary for the protection of those resorting to the inn, from the negligence and dishonest practices of innkeepers and their servants: *Holder v. Solby*, 8 C. B. N. S. 254. As will appear hereafter, it is not necessary at common law that the guest's goods should be in the special keeping of the innkeeper, it is generally sufficient that they are within the inn under his implied care, and as soon as the goods are brought into the inn, though there is no actual delivery of the goods, nor any notice of them given to the innkeeper, this custody begins. If he desires to avoid liability for their loss or injury he must give the guest direct notice. Hanging up a coat in the place allotted for that purpose is placing it *infra hospitium*, that is, in charge of the innkeeper and under the protection of the inn, though it is done in the absence of the landlord and his servants: *Orchard v. Bush*, [1898] 2 Q. B. 284; *Norcross v. Norcross*, 53 Me. 163.

In *Orchard v. Bush* the facts were as follows:—The defendants were innkeepers. Guests were accommodated at the inn with sleeping rooms if required. From 90 to

100 people who were not staying at the inn, dined in it every day. The plaintiff, who was in business in Liverpool, but lived outside the town, went to the inn for supper about 9 o'clock in the evening. He went into the dining-room and hung his overcoat upon a hook, where coats were usually hung. He then left the room for a short time to speak to the manageress of the inn, returned, had his supper, and, on leaving to catch a train home, found his coat was missing. It was decided that the plaintiff was a traveller and wayfarer, that he was a guest of the inn although he only came in for supper, that he was not guilty of negligence in leaving the coat in the dining-room temporarily whilst he went to speak to the manageress, that the defendants were responsible for the loss of the coat. Wills, J., in his judgment remarked: "I think a guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give. He need not stay the night. I confess I do not understand why he should not be a guest if he uses the inn as an inn for the purpose of getting a meal there." And further: "The innkeeper's liability is said to arise because he receives persons *causa hospitandi*. I cannot see why he receives them less *causa hospitandi* if he gives them refreshment for half a day, receiving them in the same way as other persons are received, than if they stay the night at his inn. It makes no difference that he receives a large number of people who only take a meal at the inn. He does receive them, and as an innkeeper, and his liability as an innkeeper thereupon attaches in respect of them." And Kennedy, J., remarked: "I agree that, on the facts of this case, the plaintiff was a traveller; but, apart from the question whether he was a traveller or not, I am of opinion that if a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him, he is entitled to the protection the law gives to a guest at an inn."

In *Norcross v. Norcross*, 53 Me. 163, the facts were:—The plaintiff went to the defendant's hotel on 17th September, stayed three nights, was there again from 22nd to 26th September, and again from 29th September to 1st October, and again from 13th to 19th October. He paid his bill up to the 19th. That evening another hotel in the town was burned. A great many were going in and out of the office. Plaintiff, whose coat was hanging in the place

allotted for that purpose, took it and put it on, as he was afraid that in the bustle some one might steal it. He went out and returned about 11 o'clock. A man came in and wanted lodging. Defendant could not accommodate him; plaintiff then told defendant that the man could have his room, and he would go elsewhere for the night. He did so, and took his coat with him. Next morning he came back. No one was in the office. He did not register. He hung up his coat where others hung theirs. He did not leave it in charge of any one. He then went in to breakfast. When he came out of the breakfast-room his coat was gone. It had been stolen. It was decided that plaintiff was a guest and that the innkeeper, the defendant, was liable for the loss of the coat; that if a guest, in the absence of the landlord and his servants, hang up his coat in the place in an inn allotted for that purpose, it is *infra hospitium*.

In *Bennett v. Mellor*, 5 T. R. 273, the plaintiff's servant took goods which he had been unable to sell at the weekly market, to the defendant's inn, and asked the defendant's wife if he would leave them till the week following. She answered she could not tell, for they were full of parcels. The plaintiff's servant then sat down in the inn and had some liquor. He put the goods on the floor beside him, whence they were stolen. It was decided that the plaintiff's servant had by sitting down and partaking of refreshment become a guest and that it became the duty of the innkeeper to protect his goods or answer for their loss.

In *McDonald v. Edgerton*, 5 Barb. (N.Y.) 560, the plaintiff sued defendant, an innkeeper, to recover the value of an overcoat. Plaintiff stopped at defendant's inn on general training day, about 7 o'clock in the morning; soon after the plaintiff came he took off his overcoat; he gave the overcoat to the barkeeper; he treated a number of people at the bar and paid for the liquor; he then went out; in the evening he came back and asked for his coat; it could not be found; the defendant was held liable. In giving judgment the Court remarked: "The purchasing of the liquor was enough to constitute the plaintiff a guest;" citing *Bennett v. Mellor*, 5 T. R. 273; 2 Kent's Com. 593; *Clute v. Wiggins*, 14 Johns. 175. Again: "It is fairly to be inferred from the evidence in the case that the plaintiff lost his coat before he started to leave the town to go home, and if he was only out to see

the town or to view the training, intending to return to the defendant's before he left for home and get his coat, then, I think, he was still to be considered as a guest of the defendants;" citing 2 Croke's R. 189, and 1 Comyn's Dig. 421, 413, and Grinnell v. Cook, 3 Hill R. 490.

An innkeeper cannot discharge himself of the duty imposed upon him by the common law by a general notice. If he desires to limit his liability in any way he must give the guest express notice, that is, the notice must be brought home to the guest. The posting up of, or the putting upon the hotel register book, a notice, is not sufficient unless it can be shewn that the guest saw it and read it: *Richmond v. Smith*, 8 B. & C. 9; *Packard v. Northcraft*, 2 Met. (Ky.) 442. In *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. 271, it was decided that the signing of a register under a printed heading containing an agreement that the innkeeper shall not be responsible for the loss of valuables unless deposited in the safe, is not the contract of the guest, in the absence of any proof that it was seen or assented to by him.

In *Morgan v. Ravey*, 6 H. & N. 265, the plaintiff was staying at an hotel in London. In his bedroom was hung up a notice that, in consequence of robberies having taken place at night in London hotels, the proprietor requested visitors to bolt their doors and leave their valuables at the bar, otherwise he would not be responsible. This notice plaintiff saw, but swore he read only the word "notice." He did not bolt his door (because, as he said, he did not know how), nor did he leave his watch or other valuables at the bar; next morning they were gone; the jury having found that there was no negligence on his part, the Court refused to disturb the verdict for the plaintiff.

The defendant, by holding himself out as an hotel-keeper or innkeeper and his house as a common inn, invited the plaintiff as one of the travelling public to become a guest. The plaintiff accepted that invitation and entered the hotel with the intention of becoming such. He did not see or learn of any notice nor have any knowledge that the defendant had provided a room and a man in charge where and with whom he could leave his coat, but, seeing others whom he speaks of as guests, hanging their coats on hooks evidently provided for that purpose in the office or public room, hung his coat there also. The defendant must be taken to

know that the plaintiff had accepted the invitation and offered himself as a guest and hung his coat where he did. There was no need for the defendant to, by any act or word, signify that he accepted the plaintiff as a guest. If he did not wish to accept him as such he should have, when the plaintiff entered the inn, so notified him. It appears to me that the plaintiff became a guest from the moment he entered the defendant's hotel with the intention of becoming such, which intention, I think, was well shewn by the plaintiff's conduct. He was a traveller; as such he entered the hotel, took off and hung up his coat, thus shewing an intention to remain, which he did, and had his dinner. No stronger evidence of intention is required. It was not necessary that he should enter his name in the hotel register. If there was any doubt of his intention, or of his being accepted as a guest up to the time of having his dinner, it was then removed, and that act, I think, if it be necessary, related back to his entrance into the hotel and his hanging up of his coat. The relation of landlord and guest having once been established, the presumption is that that relation continued up to the time in the evening when he declared his intention to, as a traveller, leave the inn and not return again. Having his evening meal puts beyond doubt the continuation of the relation of landlord and guest.

The hanging of his coat on one of the hooks in the public room, even though the hotel was thronged with people, was not negligence on the part of the plaintiff. The hooks were evidently, I think, provided for such a purpose and invited such an act. The defendant knew they were being used for that purpose on that day by his guests, and if he did not wish them so used he should have either removed them or insisted on the plaintiff placing his coat elsewhere—in the check room for instance. If then the plaintiff resisted the defendant's insistence and in turn insisted on his coat remaining where he hung it, it may be that the defendant would be free from liability. Defendant cannot be heard to say that he did not know that plaintiff hung his coat where he did. It was his duty to know, his duty to remove it to a place of safety or to safely guard it where it hung. The plaintiff, continuing to be a guest up to the time in the evening when he left the hotel to return home, had the right to leave the inn for the purpose of seeing the town or any spectacle therein, and to leave his

coat where he had hung it, relying on the defendant guarding it safely during his temporary absence.

On the evidence submitted in this action I find that defendant was on 2nd October, 1906, the keeper of a common inn, known as the Clark House, in the village of Georgetown; that plaintiff on that day was a traveller and became a guest at the said inn, and that the relation of landlord and guest was established between them; that plaintiff, by hanging up his coat where he did, placed it *infra hospitium*, that is, in the custody of defendant as innkeeper; that plaintiff's coat was in defendant's charge and under the protection of defendant's inn at the time of its loss; that plaintiff had no notice of any intention or desire on the part of defendant to limit his common law liability; that the plaintiff was not guilty of negligence in hanging up his coat and leaving it where he did.

The amount sought to be recovered as damages for the loss of the overcoat, gloves, and handkerchief is \$20. There was no evidence on the value of the articles except plaintiff's. Judgment will be entered for plaintiff against the defendant for \$20 damages and costs.

Lest it may be thought I have overlooked the Liquor License Act and the Innkeepers' Act, I may say they do not bear upon the question in this action.

THE ONTARIO WEEKLY REPORTER

(To and including June 1st, 1907).

VOL. X.

TORONTO, JUNE 6, 1907.

No. 3

CARTWRIGHT, MASTER.

MAY 27TH, 1907.

CHAMBERS.

CLARKSON v. JACOBS.

*Pleading—Statement of Claim—Specific Performance—
Indefiniteness—Documents—Rules 275, 469—Amendment.*

Motion by defendant Woodworth, one of eight defendants, for an order striking out the statement of claim as embarrassing or requiring plaintiffs to amend.

Featherston Aylesworth, for applicant.

R. F. Segsworth, for plaintiffs.

THE MASTER:—This is one of the many actions arising out of dealings with mining lands. Woodworth was the agent of the owners, who gave him authority to sell for \$150,000, as set out in a letter of 22nd March, 1906. On that day plaintiffs agreed with Woodworth to buy at that figure, as appears by a letter of that date from plaintiffs to defendant. At that time it was agreed that the owners should give an option to Woodworth to hold as trustee for defendants, and that when a further sale was made plaintiffs should have for their profit the excess over \$150,000. At the same time plaintiffs offered the property to three of the other defendants for \$200,000, and on 2nd April an agreement of sale was executed. Plaintiffs ask specific performance of this last agreement and payment to them by Woodworth of \$25,000, as set out in a letter from him to them of 3rd April, 1906. The statement of claim then sets out a certain agreement of 7th April made between the

purchasers from plaintiffs and the other two individual defendants by which the latter and Jacobs were to make the payments under the agreement of 2nd April to form a company to take over and work the property. Plaintiffs then set out that the 6 individual defendants conspired to defraud plaintiffs not only of the \$25,000 which they were to receive from Woodworth, but also of certain shares which they were to receive in the first formed of the two defendant companies.

I agree with the argument that the statement of claim is not in itself sufficiently explicit to require the applicant to plead thereto, unless he is otherwise fully informed of the facts. Rule 275 has not been complied with, as several documents are referred to of which it cannot be said that the effect has been given.

It is admitted that the defences of all the other defendants have been delivered, they having availed themselves of Rule 469 and been furnished with copies of the various documents which are referred to in the statement of claim. This, however, they were not bound to do. Rule 469 is not intended to qualify Rule 275, but to enable the other side to see whether the effect of a document mentioned in their adversary's pleading has been correctly stated.

Plaintiffs should amend within a week, and defendant Woodworth will have 8 days to plead. It would be wise to furnish copies of the documents referred in the statement of claim at the time of its delivery, if the applicant wishes for them.

The costs of this motion will be to defendant in any event.

BOYD, C.

MAY 27TH, 1907.

TRIAL.

MARTIN v. GIBSON.

Company — Directors — Issue of New Shares — Allotment by Directors to themselves at Par — Shareholders — Rights of Minority — Voting Power — Ultra Vires — Ratification — Statutes — Fraud — Injunction — Costs.

Action by Richard S. Martin, suing on behalf of himself and all other shareholders of the Hamilton, Grimsby, and

Beamsville Electric Railway Company, against J. M. Gibson and others, directors of the company, and against the company, J. W. Nesbitt, and J. G. Gauld, for a declaration of the invalidity of the issue by the directors of 2,000 shares of capital stock of the company, for an injunction, and other relief.

G. T. Blackstock, K.C., and H. E. Rose, for plaintiff.

G. Lynch- Staunton, K.C., and M. J. O'Reilly, for defendants Gibson and others.

A. M. Stewart, for defendants Nesbitt and Gauld and the company.

BOYD, C.:—While many subsidiary questions have been raised and discussed, the main point of controversy rests on the manner of allotment of the new issue of capital stock. The first batch of 350 shares the directors allotted *ex parte* to themselves at par, and also allotted the remaining 1,650 to themselves at par, after issuing a circular to which the objecting plaintiffs made no response except by way of protest. The directors did not wish and did not purpose or intend to allot the new stock among the shareholders *pro rata*, but so to deal with the last 1,650 as to appropriate for themselves enough shares to give them more than a two-thirds majority in value of shareholders.

At the time of the increase of capital there was a distinct cleavage of the shareholders into two bodies: the majority, represented by the directors, advocated a policy of expansion and betterment which would call for large expenditure and a withholding of dividends; the minority, representing over one-third of the whole, were strongly in favour of such management and husbanding of the road and its resources as might secure some return to the shareholders in the way of dividends.

The special Act incorporating the company provides for the substantial action and influence of a minority of the shareholders over one-third in voting value, and in certain cases disqualifies the majority from exercising control unless that majority is of at least the two-thirds in value of the body of shareholders.

Thus the capital stock may be increased upon sanction of two-thirds at least in value of the shareholders: 55 Vict. ch. 95, sec. 15 (O.), as expanded by R. S. O. ch. 170, sec.

34 (6). And certain traffic and other arrangements with other companies are permissible only upon terms to be approved of by two-thirds in value of the shareholders: special Act, sec. 46 (1892).

By the allotment of 350 shares of new stock at par by the directors to five of their own number (being the first named 5 defendants), without any intimation of what was being done, the board changed the voting power of the company so that the plus-one-third minority was converted into a minus-one-third, and the former mere majority, represented by the directors and those holding shares in sympathy with them, was enlarged into plus-two-thirds majority. The power of revision and sanction conferred by the statute on the plaintiffs and those they represent as being a plus-one-third minority was by this arbitrary action of the directorate overborne and practically expunged. This was on 2nd April, 1906. Then on 16th October, 1906, the balance of the increased capital (viz., 1,650 shares) was allotted by the directors to the same 5 defendants.

I am of opinion that the minority shareholders were not required to submit to the form of application proposed by the circular letter issued. They were invited to state whether they desired to increase their holdings, and it was on terms that such shares might be allotted as to the directorate seemed desirable and necessary. There was no recognition of any right on the part of existing shareholders to claim a pro rata division of the proposed new issue, and at this time by the appropriation of the 350 shares the minority had become less than one-third in value of the shareholders. Therefore I do not hold the plaintiffs to be precluded by the limited opportunity afforded by the circular from now seeking relief in respect of the total issue and allotment of the new stock. The action of the directors is left open to the investigation of the Court.

The only statutory direction which I can find or to which I have been directed as to the allotment of this stock is the general Act (incorporated with the special), R. S. O. ch. 170, sec. 34, No. 16, which enacts that the directors shall make by-laws for the management and disposition of stock . . . not inconsistent with the laws of the province. I do not find nor was I referred to any by-law of the company with relation to the allotment or disposal of new shares—or indeed as to any stock or shares. The matter then rests on

the general powers and functions of the directorate of such companies. The underlying principle of action is to be found in the language of Romilly, M. R., in *York v. Hudson*, 16 Beav. 491, where he says: "A resolution by the shareholders that shares shall be at the disposal of directors is that it shall be at the disposal of trustees, i.e., that the persons intrusted shall dispose of them within the scope of the functions delegated to them in the manner best suited to benefit their cestuis que trust." Now, the persons to be considered and to be benefited are the whole body of shareholders—not the majority, who may for ordinary purposes control affairs—but the majority plus the minority—all in fact who being shareholders constitute the very substance (so to speak) of the incorporated body. Touched with this test, it would seem very plain that the action of the directorate was to benefit themselves as shareholders—the appropriation of the new shares gave them the absolute control of corporate affairs and removed any opposition that might arise from the united action of the reduced minority. The act of the directors changed the plus-one-third minority into a minus-one-third and enlarged the minus-two-thirds majority into an overwhelming majority, who might act in spite of and overrule all opposition from the dissentient shareholders.

This transaction appears to me in principle to be in excess of the powers of management intrusted to the directors for the benefit of the company. It is a one-sided allotment of stock which ignores the just claims of many shareholders, and in effect amounts to a prejudicial encroachment on the voting power of the minority. The principle of decision in *Punt v. Lynn*, [1903] 2 Ch. 517, and other cases, is applicable to shew that this method of manipulating shares either with a view to or which results in an unfair control of the voting power is ultra vires of the directorate and not susceptible of being ratified by the majority of the shareholders. Anything looking to a confiscation of corporate rights or privileges by a majority at the expense of a minority is frowned upon by the Court; *Griffith v. Paget*, 5 Ch. D. 898; *Meunier v. Hooper*, L. R. 9 Ch. 350; *Percival v. Bright*, [1902] 2 Ch. 425.

It was suggested, perhaps rather than argued, that what was done was in pursuance of the discretionary power conferred upon the directors by sec. 6 of the special Act. That

enables the directors in their discretion to exclude any one from subscribing for stock who in their judgment would hinder, delay, or prevent the company from proceeding with and completing their undertaking under the provisions of the Act. I think the provision contains its own express limitation as to time; the road as then contemplated was finished before their exclusive action was taken. And another limitation is that it applies to new subscribers, and not to those who have the status of shareholders. Being shareholders, the plus-one-third minority had a statutory footing to refuse assent to an increase of capital, and also to refuse sanction to any of the special schemes for extension provided for in sec. 46 of the Act of 1892. It may be that it was not in the immediate and direct contemplation of the directors to oust the minority from their place of vantage, but this was the inevitable effect of what was done; and, while this consideration helps to eliminate the element of fraud, it does not lessen the injurious effect of the partial allotment. I do not find any fraud to be established, and it is not necessary to allege it in order to get relief. The costs have been but little—if at all—increased in this regard, so that costs of the action may be awarded to the plaintiffs, excluding any costs arising from the charge of fraud.

The judgment should be so framed as to restrain voting upon the increased capital shares, and declaring that the allotment to the 5 directors and their appointees was in excess of the powers of the directors. If necessary, the allotment may be vacated so that the whole increased issue may be laid open to be properly disposed of having regard to the interests of all the shareholders.

It has not been necessary to consider the doctrine of "inherent right" which is discussed and upheld in the American cases, but I am inclined to think that the same conclusion as has been arrived at in this case would have held good even if no element of the plus-one-third minority had entered into consideration, on the general principle and guide in dealing with the distribution of new stock and the claims of existing shareholders that "equality is equity."

During the argument I gathered that the money paid for the 350 shares is still unexpended by the company; if this is the case, that money should be refunded. If expended, it should be repaid by the company to the 5 defendants who paid for the same.

CARTWRIGHT, MASTER.

MAY 28TH, 1907.

CHAMBERS.

PHERRILL v. SEWELL.

Particulars — Statement of Claim — Conspiracy — Libel and Slander—Affidavit—Amendment — Rule 268 — Disclosing Evidence.

Motion by defendants for particulars of statement of claim before delivery of statement of defence.

J. W. McCullough, for defendants.

T. N. Phelan, for plaintiff.

THE MASTER:—The motion is supported only by an affidavit of the agent of defendants' solicitor. This does not state that particulars are necessary for formulating the defence.

The statement of claim alleges that defendants unlawfully conspired together and with 32 persons whose names are given "and with other persons at present unknown to plaintiff," to publish a libel in the form of a petition to the council of the township of Markham asking that plaintiff be removed from certain premises occupied by her in said township. It then sets out the petition and charges publication to the members of the township council and others in attendance thereat, as also to those whose names are set out in the preceding paragraph, with a sufficient innuendo.

In the succeeding paragraph defendants are charged with slander also uttered at the same time to the persons already mentioned, and charging plaintiff with a want of chastity.

Plaintiff then alleges that she has been greatly injured in her character and reputation, and claims \$10,000 damages.

Apart from the absence of any sufficient affidavit of the necessity of particulars at this stage, there does not seem any reason for the order asked. The main grounds of the action are libel and slander. As to these only 3 defences are possible, and none of them would derive any assistance from the particulars demanded.

The 4th paragraph should be amended by inserting the words "spoke and" before the word "published" in the

3rd line so as to make it clear that this charge is one of slander. If plaintiff wishes to avail herself of R. S. O. 1897 ch. 68, sec. 5, sub-secs. 1 and 2, it should now be done. There is no allegation in the statement of claim of any special damage.

The statement of claim otherwise seems to comply with the provisions of Rule 268. To give what defendants ask would be to require disclosure of plaintiff's evidence. So far as this is to be had, it can be obtained on discovery.

The motion is dismissed, but with costs in the cause, as paragraph 4 was not clear, and may perhaps be further amended as indicated above. . . .

The indorsement on the writ of summons is only for libel and slander. From this it would appear that plaintiff is not making any separate claim for conspiracy. It would seem to be self-evident that the real ground of action must be what took place at the council meeting when the petition was presented and the alleged slander uttered.

MAY 28TH, 1907.

DIVISIONAL COURT.

MOFFAT v. CARMICHAEL.

*Costs — Scale of — Action for Injury to Land — Easement —
Disturbance — Value of Land — Amount of Damages —
County Courts Act — Jurisdiction of County Courts.*

Appeal by defendant from order of CLUTE, J., in Chambers, reversing ruling of a taxing officer upon taxation of plaintiff's costs of an action in the High Court, and directing that the costs be taxed upon the High Court scale.

The appeal was heard by BOYD, C., ANGLIN, J., MAGEE, J.
W. Proudfoot, K.C., for defendant.

T. P. Galt, for plaintiff.

BOYD, C.:—The learned Chief Justice who tried the case succinctly sums up what was the subject of the litigation in these words: "The action is for damages for the

injury said to be caused to the plaintiff's house by the severance of a building—the plaintiff's and defendant's houses having been built as one building and a severance having been made by the defendant . . . which it is said was negligently and improperly done so as to cause damage to the plaintiff's house." The plaintiff is adjudged entitled to succeed, and for injury to her property damages of \$140 are awarded.

The Chief Justice does not decide that the action was of the proper competence of the County Court—he leaves that open upon taxation—but expresses the opinion that, in view of the small amount which plaintiff was willing to accept before litigation (\$40 or \$50), she might well have sued in the County Court. And, of course, if the question of jurisdiction had not been raised by defendant, all would have probably gone on without objection.

But, upon strict law, I think that the case is one which was not within the jurisdiction of the County Court, because the value of the house in question must manifestly be more than \$200. Though the injury arose from the disturbance of the right of support of plaintiff's house, yet the injurious effects of the severance extended to the structure itself, which was damaged to the extent of \$140. The County Court has jurisdiction in actions for injury to land where the value of the land does not exceed \$200; R. S. O. 1897 ch. 55, sec. 23 (8). Here was injury to land in respect of the house erected upon and forming part of it to the extent of \$140—but the house itself and land affected were worth over \$200—so that the lower Court was ousted of jurisdiction.

No doubt, the right of easement was disputed and established, but the effect of disturbing plaintiff's easement was to damage her land (i.e., house)—and the test of jurisdiction is the value of the land.

I therefore agree in Mr. Justice Clute's ruling that plaintiff should get costs on the High Court scale. The appeal is dismissed with costs.

As to the cases cited for the appeal, *Stotworthy v. Paull*, 55 L. J. Q. B. 228, is the decision of the Court upon an English statute whose language is very different from ours. *Stewart v. Jarvis*, 27 U. C. R. 467, related to former legislation as to the jurisdiction of County Courts now changed.

The present sections of the County Courts Act as to jurisdiction must be read so as to harmonize the 1st and 8th subsections of sec. 23. . . .

ANGLIN, J., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

MAY 28TH, 1907.

DIVISIONAL COURT.

NATIONAL CASKET CO. v. ECKHARDT.

Trade Name—Infringement—Similarity—Distinction — Advertisements—Absence of Fraud or Deception—Passing off Goods.

Appeal by plaintiffs from judgment of MACMAHON, J., 9 O. W. R. 313, dismissing an action brought to restrain defendant from using the name "National Casket Company" to the prejudice of plaintiffs.

E. F. B. Johnston, K.C., and R. McKay, for plaintiffs.

G. H. Watson, K.C., for defendant.

The judgment of the Court (BOYD, C., ANGLIN, J., MAGEE, J.), was delivered by

BOYD, C.:—Having read all the evidence, I find a conspicuous absence of testimony to indicate that any one has been misled or confused in regard to any relation or connection between the American and the Canadian company. Theories are broached and hypothetical questions are asked as to whether the name and manner of advertising adopted by defendant would not suggest that the National Casket Co., the plaintiffs, were doing business in Ontario under the conduct of defendant as agent and manager; but no witness declares that such was the action of his mind, and many witnesses negative such result and say that it would never have occurred to them. That this last estimate is the correct one I cannot bring myself to doubt, upon consideration

of all the testimony and circumstances of the case. The defendants had for about 20 years a name and business of renown among the undertaking fraternity, and had nothing to gain by merging himself in a foreign company. His standing was old and well established when plaintiffs began to do business in a small way in some few places in Canada. He carried on business under the name of "Eckhardt Casket Company" till his place was completely destroyed by fire in April, 1904. Before this, and before he knew of any business being done in Canada by plaintiffs, he and 5 other undertaking firms agreed to form a consolidated company, and obtained letters patent in May, 1903, by the name of the "National Casket Company Limited." This name they decided upon without reference to the American concern of that name, under influence of the stirrings of national life then becoming manifest in Canada. After the fire defendant's business was suspended about 2 years; he acquired by purchase all interest in the patent after the consolidation scheme failed. After the fire and upon the commencement of his new business in August, 1905, he changed the name of his business to the "National Casket Co.—Eckhardt's"—registered his business in that name, and advertised extensively in that name in all trade papers and by the usual methods of circulars, catalogues, and sample cards. Some of these reached the hands of or were seen by plaintiffs in August, September, or October of the same year. He then made appeal to the Canadian trade constituency, consisting of 1,700 or 1,800 dealers in all Canada, most of whom were personally known to defendant. These people—the initiated public—well understood the meaning of the advertisement as compared with the advertisements and circulars contemporaneously issued by plaintiffs. It did not occur to any of them to suppose that what was advertised by defendant was the establishment of an agency or branch of the American company in Canada with defendant as its manager; on the contrary, as one witness, Leitch, said, referring to the methods of advertising of both companies in their appeal to the trade, "I never thought of them as connected, because one was in Canada and the other in the United States." To his mind the generic word "National" sounded a distinct allusive note in each name.

The business done by defendant at the time of the fire was about equal to one-half of all the Canadian trade, being

in figures an output at the rate of \$250,000 a year, and his present business is about the same as when the fire interrupted its course. Turning to plaintiffs, the total amount of their goods shipped to Canada since the beginning of their operations in this country amounts to \$22,000—up to the date of the fire in 1904 the total, according to their shewing, was less than \$10,000. The total number of undertakers to whom they sold is from 41 to 45, and not one is called to shew any mistake or confusion arising out of the names adopted and advertised by plaintiffs and defendant respectively.

Unless the Court takes upon itself to say, contrasting the advertisements, etc., that the one can be mistaken as a modification of the other, the judgment in appeal must be upheld. I do not pretend to be wiser in this regard than the many witnesses belonging to the trade who were called, and none of them could say that he was misled or likely to be misled in the premises. That is the test to be applied in this case—the appeal to do business by the various advertising methods of both parties is made to members of the trade, and not to the general public, and, in my opinion, there is no evidence, either by word of mouth or by inspection of eye, to lead to a conclusion that defendant's business name, as distinguished by the addition of his personal name, misleads or confuses or tends to mislead or confuse the customers who purchased caskets in Canada.

I would dismiss the appeal with costs.

MAY 28TH, 1907.

DIVISIONAL COURT.

ROMAN CATHOLIC EPISCOPAL CORPORATION v.
O'CONNOR.

*Will — Execution — Procurement by Importunity — Influence
Exercised by Sister over Dying Man — Setting aside Will —
Establishment of Earlier Will — Construction — Action —
Costs.*

Appeal by plaintiff from judgment of MABEE, J., in an action for a declaration that a certain instrument in writing

executed on 9th August, 1902, was not the last will and testament of Cornelius McAuliffe, deceased, and to establish a will executed 3 days earlier, and for construction. MABEE, J., found in favour of the later will, and construed it as an absolute bequest of all the testator's property to his sister Johanna McAuliffe, who had since died intestate. The defendant O'Connor was the executor named in both wills, and under the earlier will he and the plaintiff were given the property after a life estate to the sister. The testator and his sister were unmarried, and there were no known relatives.

H. T. Kelly, for plaintiff.

J. B. Dow, Whitby, for defendant O'Connor as executor and in his personal capacity.

D. Henderson, for defendant O'Connor as administrator of the estate of Johnanna McAuliffe, and for the Attorney-General for Ontario.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—Cornelius McAuliffe, an old man of 68 or 70, lived in Whitby with his still older sister, Johanna McAuliffe; they had no known relatives living, and had lived in Whitby or the vicinity for over 35 years. She was a most economical woman, almost insane on the subject of money, suspicious of every one about her, and willing to do almost anything to gain money or to get it into her possession.

About the beginning of August, 1902, Cornelius was so ill that a doctor had to be called in; the patient was found to be very weak, suffering from catarrhal inflammation of the stomach, which caused vomiting, intense nausea, great weakness, depression, and indeed prostration. He "got weaker all the time," and this condition, instead of improving, got worse. The sister was his only nurse and attendant, and it seems clear that she frequently spoke to him and troubled him about his property. On 6th August, 1902, John O'Connor was told by Cornelius that he was very weak and likely to die, and to call in Mr. O., a solicitor whom he knew and had seen passing. Mr. O. had been previously employed professionally by the sick man. Mr. O. drew up a will in accordance with the instructions of the testator,

and it was executed on 6th August, 1902, and left with the testator. He was then confined to his house and lying on the sofa by the fire, or possibly in bed.

On 9th August, 1902, Johanna came to the door as Mr. O. was passing and called him in. The will of the 6th was read over and explained. Cornelius was then very ill indeed and in bed. Johanna insisted on a change being made in her favour. The sick man was very unwilling to make the change, but his sister became very much excited, she spoke in a commanding way, was exceedingly boisterous, and expressed a determination to have the will changed or she would destroy it. She went to the bed and stood over the testator and told him she would have it changed. The testator swore at her and told her to go away, but it does not seem that this had any effect. She continued to insist, and, as the solicitor says, "after she had worried and tormented her brother till he was all tired out, he said to me, 'Well, make it to please her, Mr. O., I am sick, I am dying soon, and I must have peace'—words to that effect, begging for quiet." This whole scene lasted about an hour. The man was dying, and he knew it; the disease from which he was suffering rendered him exceedingly weak, and very much depressed, and he was in the condition (the medical evidence shews) in which he would do anything and give in in anything for the sake of peace and quiet. "He knew he was dying," says the medical attendant, "and would yield to anything." The sister is said to have been a woman of strong body and strong will. The testator died on 13th August.

I am of opinion that a will procured as this was cannot stand.

More than two centuries ago, Rolle, C.J., laid down that if a man makes a will in his sickness by the over-importunity of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will: *Hacker v. Newborn*, Styles 427; and much the same thing is said in *Lamkin v. Babb*, 1 Lee Ecc. R. 1. I do not find that this exposition of the law has ever been questioned. All the cases are collected in *Williams on Executors*, vol. 2, ch. 1, sec. II.; and the conclusion I have arrived at seems to be entirely supported by the authorities there cited.

Of course, "importunity" in its correct legal acceptance must be of such a degree as to take away from the testator free agency; it must be such importunity as he is too weak

to resist, such as will render the act no longer the act of the deceased nor the free act of a capable testator: Williams on Executors, 9th ed., p. 39.

All these conditions—or, speaking more strictly, this condition—we find clearly proved in the present case. . . .

[Reference to Boyser v. Rossborough, 6 H. & C. 2; Sefton v. Hopwood, 1 F. & F. 578; Lovett v. Lovett, ib. 581; Hall v. Hall, L. R. 1 P. & D. 481; Parfitt v. Lawless, L. R. 2 P. & D. 462; Baudains v. Richardson, 22 Times L. R. 333.]

Had I come to a different conclusion, I should, as at present advised, have had great difficulty in following the learned trial Judge in his interpretation of the will in respect of the estate taken by Johanna. I am not satisfied that the words of this will can be successfully distinguished from those of the wills in such cases as Bibbens v. Potter, 10 Ch. D. 733; Constable v. Bull, 3 De G. & S. 411; In re Pounder, 56 L. J. Ch. 113. But it is unnecessary to pursue this inquiry, in the view I have taken of the case.

Regularly the judgment of this Court would be that the will of 9th August should be declared invalid and the will of 6th August be declared valid, and an order made vacating the probate of the former and directing the proving of the latter. In the very peculiar circumstances of representatives here, the proper result will be, I think, best reached by a declaration that the executor of the late Cornelius McAuliffe took the estate of his testator upon the trusts of the will of 6th August. And . . . the costs of all parties, both of the action and of the appeal, may be paid out of the estate.

MAY 29TH, 1907.

DIVISIONAL COURT.

PATTERSON v. DART.

Limitation of Actions—Real Property Limitation Act—Conveyance of Land—Security—Agreement—Default—Redemption—Sale—Possession.

Appeal by plaintiff from judgment of MACMAHON, J., 8 O. W. R. 800, dismissing the action with costs.

The appeal was heard by MULOCK, C.J., MAGEE, J., CLUTE, J.

Walter Mills, Ridgetown, for plaintiff.

E. F. B. Johnston, K.C., and J. M. Pike, Chatham, for defendant.

CLUTE, J.:— . . . The two questions for decision on this appeal are: First, is plaintiff barred of the right to redeem by the Statute of Limitations? Second, if not, did plaintiff effectually release his equity of redemption to defendant by the agreement of 27th April, 1895.

In the prior action Armour, C.J., had declared the deed of 28th March, 1893, to be in fact a mortgage, and plaintiff entitled to redeem on payment of the amount found due in respect thereof, and in default to a sale of the lands, with a reference . . . to take the accounts. Instead of proceeding under this decree, the parties entered into a new agreement on 27th April, 1895; and this case turns largely on the legal effect of this agreement, having regard to what was done and left undone by the parties to it.

The trial Judge disposed of the case upon the ground that defendant had been in possession since 27th April, 1895, and any claim plaintiff may have had was barred by the statute at the time the writ was issued on 29th June, 1905. I am unable to reach this conclusion. In the first place plaintiff did not enter as mortgagee. He claimed under an absolute deed. It is true that the judgment in the former case declared him to be a mortgagee, but down to the date of the judgment, at all events, he had no right to avail himself of that position, as he claimed adversely to it: *Faulds v. Harper*, 11 S. C. R. 639. From November, 1894, he continued in possession, and was in possession when the agreement of 27th April, 1895, was made. Under that agreement the parties expressly fix the day for redemption as 1st July, 1895, and for payment of the amount due. But what amount? What is to be ascertained as provided in the agreement . . . by taking the amount of the advances made by defendant up to 1st February, 1895, therein fixed at \$3,076.01. The receipts are fixed at \$1,679.29, and the estimated receipts to 1st July at \$412.50, and estimated expenditure for taxes \$161.50 and interest on the same \$195. It then states the prior mortgage to be \$6,000. Then follows this important clause: "The amount of the judgment

and costs as ordered by the Judge to be added to or set off against the above amounts shall be ascertained before 15th June, 1895."

So that under these costs were ascertained and set off the amount which plaintiff must pay to entitle him to redeem is unknown, and the document therefore provides that, immediately after the taxation of the costs payable by the said parties, the total amount payable by plaintiff to defendant "shall be ascertained by computing the amount paid out and allowed" to defendant, "as above set forth," including all amounts which will be necessarily paid out by him before 1st July, 1895, and the judgment with costs which was adjudged should be paid," etc., and deducting the amounts received by defendants as above mentioned and plaintiff's costs payable by defendant under said judgment, "and the said sum so ascertained," to be payable by plaintiff to defendant not later than 1st July, 1895. Plaintiff then expressly covenants to pay the sum so found due on the said date. Defendant then covenants, upon payment of such sum "so found to be due," to reconvey the said lands to plaintiff. The agreement further provides that if default is made in payment "of the said sum so found to be due" by 1st July, 1895, defendant may, without notice, advertise and sell the said lands, subject to a reserve bid of \$7,700; that until such sale defendant shall be possessed of the rents and profits, and, after such sale, of the proceeds thereof, upon trust to pay the costs of sale and the "principal sum so found to be due in respect of the said lands and premises," and to pay any surplus to plaintiff.

The agreement then further provides that the property shall be put up at auction "as aforesaid" subject to a reserve bid of at least \$7,700, after one advertisement of at least two weeks in local papers and by posters, and if there shall be no bona fide bid equal to or greater than \$7,700, then plaintiff "shall receive credit for the sum of \$1,700 upon his said indebtedness" to defendant, computed as aforesaid, "in the first place in extinguishment of the indebtedness with reference to the said lands and premises, and in the second place in reduction of the amount of the judgment of the party of the second part against the party of the first part. And the said party of the first part, his heirs and assigns, shall stand absolutely debarred and fore-

closed of and from all equity of redemption in and to the said lands and premises, and these presents shall be considered an absolute release to the party of the second part, his heirs and assigns forever, of all the right, title, interest, and equity of redemption of the party of the first part, his heirs, executors, administrators, and assigns, in, to, or out of the said lands and premises."

I am of opinion that defendant was in possession under the terms of the agreement as trustee for the purpose of carrying it out; that plaintiff's right to bring action to redeem was under the terms of this agreement, and that such action could not be brought before 1st July; that the action in effect would be for the recovery of the land upon payment of the amount due, to be ascertained pursuant to the terms of the agreement; that plaintiff was, in a sense, in receipt of the rents—that is, that defendant accounted to him for them in anticipation of their payment, and having done so he was entitled to retain possession under the agreement for the term he had thus paid for; and that no action would lie against defendant until 1st July, 1905.

It is contrary to the practice of the Court to decree the redemption of a mortgage before the day appointed for that purpose has arrived: *Brown v. Cole*, 14 Sim. 427: "because during that time the mortgage must remain as a security for the loan advanced, and it is not competent for the mortgagee or the mortgagor to disturb that relation:" *Bovill v. Endle*, [1896] 1 Ch. 651.

Whether a redemption suit is also an action for the recovery of land was much discussed in *Faulds v. Harper*, 11 S. C. R. 655. The Divisional Court (2 O. R. 405) followed *Hall v. Caldwell*, 8 U. C. L. J. 93, in preference to *Foster v. Patterson*, 17 Ch. D. 132, and *Kinsman v. Rouse*, ib. 104. The Court of Appeal treated *Hall v. Caldwell* as having been overruled. In the Supreme Court *Strong, J.*, agreed with the Judges of the Divisional Court, "for the reason that since the two cases in 17 Ch. D. were decided the House of Lords has held in *Pugh v. Heath*, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so, it follows, a fortiori, that a redemption suit is also an action or suit for the recovery of land."

Section 4 of the Real Property Limitation Act provides that no land or rent may be recovered but within 10 years after the right of action accrued. Section 5 provides that

the right to bring such action shall be deemed to have first accrued as therein mentioned. Section 5, sub-sec. 1, provides that where a person claiming such land or rent . . . has . . . been in receipt of the profits of such land or in receipt of such rent, and while entitled thereto . . . has discontinued such receipt, then such right shall be deemed to have first accrued at the last time at which any such profits or rent was so received.

In the present case plaintiff received the rents by having them expressly credited on the debt, under the agreement. His right of action then first accrued and time began to run against him. Section 19 does not apply—does not cover a case of express agreement which applies the future rents and gives a right of redemption at the time the last rents were so applied. To hold otherwise would, in my judgment, disregard the agreement of the parties. The mortgagor does in fact receive the rents to 1st July. They are applied on the mortgage, and it is declared that on that day plaintiff may redeem upon payment of the balance. If in this case he is barred, he would be equally barred if the agreement extended over 11 years, and the rents for all that time were applied on the mortgage, and redemption was expressly provided for at the expiration of the time; because, in the words of sec. 19, no such action shall be brought but within 10 years after the time when such acknowledgment was given. The reason why sec. 19 cannot, in my opinion, apply, is because plaintiff is in the receipt of the rents to 1st July, and by the agreement they are in fact applied on the mortgage, defendant receiving them as trustee for that express purpose.

Plaintiff's right to redeem may also be put on another ground. By deed defendant gave plaintiff the right to redeem on 1st July, 1895, and covenanted to convey. He is stopped from saying that plaintiff's right to bring action did not accrue on that day.

If an action would lie, I am of opinion that time would not run against plaintiff prior to that date. I do not think therefore that plaintiff is barred by the statute.

Nor do I think that what took place amounted to a release of the equity of redemption. The costs were not taxed by either party, and the amount to be found due under the terms of the agreement was never ascertained. Plaintiff never had, therefore, the opportunity of paying

defendant "on or before the first day of July." This was as much the fault of defendant as of plaintiff. Had the amount been ascertained, plaintiff covenanted to pay it, and on payment of the amount defendant was bound under his express covenant to convey the property to plaintiff. There was no default. . . .

All the proceedings, therefore, in respect of the proposed sale were wholly nugatory. It was only in the event of there being no bid equal to or greater than \$7,700 that plaintiff was entitled to receive credit for \$1,700 "upon his indebtedness" to defendant, "computed as aforesaid," and then that he should stand debarred and foreclosed of his equity of redemption. The occasion not having arisen to justify the sale, there could be none, and the provision for foreclosing the equity never came into operation.

With deference, I think the judgment of the trial Judge should be set aside and plaintiff allowed to come in and redeem, with a reference to the Master to take the accounts, making all just allowances for improvements and rebuilding after fire, after allowing for the insurance moneys received. Costs to the plaintiff in the Court below and of this appeal. Further directions and subsequent costs reserved.

MAGEE, J., gave reasons in writing for the same conclusion.

MULOCK, C.J., also concurred.

CARTWRIGHT, MASTER.

MAY 30TH, 1907.

CHAMBERS.

COLLINS v. TORONTO, HAMILTON, AND BUFFALO
R. W. CO.

PERKINS v. TORONTO, HAMILTON, AND BUFFALO
R. W. CO.

Parties — Joinder of Defendants — Cause of Action — Joint Liability—Tort.

Motion in each action by defendants the Dominion Natural Gas Co. for an order requiring plaintiffs to elect against which defendant they would proceed.

G. M. Clark, for applicants.

D. L. McCarthy, for defendants the Toronto, Hamilton, and Buffalo R. W. Co.

J. G. Farmer, Hamilton, for plaintiff Collins.

D'Arcy Martin, Hamilton, for plaintiff Perkins.

THE MASTER:—The statements of claim are similar. In each case plaintiffs allege that the injuries to the two servants of the defendants the Toronto, Hamilton, and Buffalo R. W. Co. complained of were caused by an explosion in the premises of the railway company of gas furnished to them by the gas company pursuant to an agreement in that behalf.

In the first case paragraph 11 of the statement of claim is as follows: "The defendants are each responsible for the defective condition of the said plant, etc., and the negligent use of the said dangerous and highly explosive gas."

Paragraph 8 of the statement of claim in the Perkins case is identically the same.

It was argued that plaintiffs must elect under the authority of *Hinds v. Town of Barrie*, 6 O. L. R. 656, 2 O. W. R. 995. On the other hand were cited *Symon v. Guelph and Goderich R. W. Co.*, 8 O. W. R. 320; *Norman v. Hamilton Bridge Works Co.*, 9 O. W. R. 300; and *Bullock v. London General Omnibus Co.*, [1907] 1 K. B. 264.

In view of these authorities it does not seem that the order should be made. Here, as in the *Symon* and *Norman* cases, there is a sufficient allegation of a joint liability; whether it can be sustained is not now in question. In the *Bullock* case the plaintiff claimed not only against the two defendants jointly, but also against each separately. This was held to be allowable. The observations of the Lords Justices in that case were, no doubt, obiter only. At the same time they cannot be ignored, especially in view of the remarks of the Master of the Rolls on *Sadler v. Great West R. W. Co.*, [1895] 2 Q. B. 688, [1896] A. C. 450, pointing out that in that case no joint liability was alleged, but only two independent though contemporaneous torts. This is true also of *Hinds v. Town of Barrie*, as pointed out by Osler, J.A. It is to be wished that this or some similar case be taken to the Court of Appeal so that there may be

an authoritative exposition of Rule 186, as applied to actions of this class.

At present I think the motions fail. The defendants should plead in 8 days. The costs may be in the cause, the matter being one of some difficulty.

Campbell v. Cluff, 8 O. W. R. 740, 780, may be referred to, though not strictly in point.

ANGLIN, J.

MAY 30TH, 1907.

TRIAL.

TORONTO GENERAL TRUSTS CORPORATION v.
KEYES.

*Gift — Fund Deposited with Trust Company by Settlor —
Parting with Control—Dealings with Cheques for Income—
Completed Gift—Rights of Beneficiaries—Trust—Inter-
pleader Issue—Costs.*

An interpleader issue directed to determine whether 3 sums of \$1,000 each belonged to plaintiffs, as executors of the last will and testament of one Joanna J. Phelan, deceased, or to the defendants respectively.

M. J. Gorman, K.C., for plaintiffs.

H. Fisher, for defendants.

ANGLIN, J.:—The material facts are as follows: Joanna J. Phelan in her lifetime had on deposit for investment with the Toronto General Trusts Corporation the sum of \$5,000. This money was held by the trusts corporation upon the terms of a guarantee investment receipt given to Mrs. Phelan and similar to that set forth below. In the year 1905, having a further sum of \$3,000 available, Mrs. Phelan called upon the accountant of the trusts corporation and told him that she wished to deposit this \$3,000 in the names of her two sisters, Agnes Keyes and Nora Brophy, and her sister-in-law, Julia Phelan (the defendants), giving to each \$1,000. She asked that these moneys be placed to the credit of these three persons in the same manner as the

fund held by the company for herself. She then paid over to the accountant the sum of \$3,000, and obtained from him three receipts, each in the following form:—

THE TORONTO GENERAL TRUSTS CORPORATION

GUARANTEE INVESTMENT RECEIPT

No. B 5.

\$1,000.00

“THE TORONTO GENERAL TRUSTS CORPORATION

acknowledges to have received from

Miss Julia Phelan

Mrs. E. Brophy

Miss Agnes Keyes

of Montreal, Que.,

hereinafter called the ‘investor,’ the sum of \$1,000 in trust for investment on account of the investor upon the following terms which have been agreed upon, namely:—

“The said principal shall be invested in or loaned (sic) upon such securities as the corporation shall deem safe in the name of the corporation, but to be held by the corporation as trustee for the investor.

“The corporation hereby guarantees the repayment of the said principal sum on 1st February, 1906, together with interest thereon at the rate of 4 per cent. per annum payable half yearly on the 1st days of January and July in each year, the first payment of interest to fall due on the 1st day of July next.

“That in consideration of the above guarantee the interest or profits resulting from the investment or loaning (sic) of said principal moneys over and above the said rate of 4 per cent. per annum shall be retained by the corporation for its own use and benefit as a remuneration for such guarantee and for its services in procuring investments and collecting principal and interest.

“Upon payment of the said principal money and guaranteed interest, the trust securities shall become the property of the corporation freed from the terms of the trust and without any formal assignment or release from the investor.

“This receipt and guarantee is not assignable.

"In witness whereof is hereunto affixed the seal of the corporation, testified by the signatures of its vice-president and managing director, this 1st day of February, 1905.

" W. H. Beatty,

" Vice-President.

" J. W. Langmuir,

" Managing Director."

Mrs. Phelan informed the three defendants of what she had done. She told Nora Brophy that she had deposited \$1,000 in her name in the trusts company, adding, as Nora Brophy testifies, that "it was just the same as if I put it there myself; and if I wanted to draw it at any time I could, and if I wanted to draw any part of it at any time I could do so." She also informed Mrs. Brophy of the deposits to the credit of Miss Phelan and Miss Keyes. Miss Julia Phelan was also informed by her that \$1,000 had been invested in her name at 4 per cent., and that she had made a like investment for Miss Keyes. Miss Phelan was told as well that she could draw the money and that it was hers. Mrs. Phelan also told Miss Keyes that she had invested \$1,000 in her name with the trust company and had made like investments for Miss Brophy and Miss Keyes.

The receipts obtained by Mrs. Phelan from the trusts corporation she retained in her own custody, and they were found amongst her papers after her death, which occurred on 18th October, 1906. She does not appear to have informed her beneficiaries of the existence of these documents. The accountant of the trusts corporation says that Mrs. Phelan, after making the deposit, never interfered with the matter in any way. The cheques for the interest which accrued during Mrs. Phelan's lifetime, bearing date 3rd July, 1905, 1st January, 1906, and 2nd July, 1906, respectively, were made payable to the 3 beneficiaries named in the guarantee receipts. These cheques appear to have been indorsed by the defendants in favour of Mrs. Phelan and were cashed by her for her own benefit. Though two of the defendants say that there was no understanding about the income from the money, I incline to the view that it was understood that the income was to go to Mrs. Phelan during her lifetime, and that it was pursuant to such an understanding that the cheques for the interest were in-

dorsed over to her by defendants. That the placing of the money in the names of the three defendants with the result that they, and they alone, would be entitled to receive payment of interest as well as principal from the trusts corporation, was intended and well understood by Mrs. Phelan, is made manifest by a letter which she wrote on 8th June, 1906, to one of the trusts corporation officials, in which she says: "I didn't expect that you could do anything without each one of us signing our cheques."

After the death of Mrs. Phelan, and before they had received notice of any adverse claim to these moneys, the trusts corporation on 1st January, 1907, issued and forwarded 3 cheques for \$20 each to the 3 defendants. These cheques were paid in due course to defendants, and the trusts corporation obtained receipts for such payments. On 4th February, 1907, the trusts corporation were first notified on behalf of Mr. John Phelan, the husband of the late Johanna Phelan, that he asserted that the moneys represented by the 3 investment receipts in question constituted part of his late wife's estate. John Phelan is the residuary legatee under the will of his late wife. Upon receiving notice of this claim, the trusts corporation instituted these proceedings in order to have the title to these moneys determined.

The retention by Mrs. Phelan in her possession of the receipts themselves, and the fact that the income was applied for her benefit, though made available by the indorsement of defendants upon the cheques made payable to them by the trusts corporation, are relied upon to support the propositions that the gift of these moneys was imperfect, and that, being in favour of volunteers, it cannot be made complete by the aid of a court of equity. Most of the authorities cited for plaintiffs turn upon this point, others are instances of attempted testamentary dispositions.

For defendants it is contended that the action of Mrs. Phelan amounted to a complete gift to them of the moneys in question, or to a creation by her of a trust of such moneys in their favour and enforceable by them.

"There may be difficulty in reconciling with each other all the cases which have been cited. Perhaps they are to be reconciled and explained upon the principle that a declaration of trust purports to be, and is in form and substance, a complete transaction, and the Court need not look

beyond the declaration of trust itself, or inquire into its origin, in order that it may be in a position to uphold and enforce it; whereas an agreement or attempt to assign is, in form and nature, incomplete, and the origin of the transaction must be inquired into by the Court: and where there is no consideration, the Court, upon its general principles, cannot complete what it finds imperfect:" *McFadden v. Jenkins*, 1 Hare 418, 462.

As I view the facts of this case, the settlor did "everything which, according to the nature of the property, was necessary to be done in order to transfer the property and render the settlement binding." She "transferred the property to the trustee for the purposes of the settlement:" *Milroy v. Lord*, 4 DeG. F. & J. 264, at p. 274.

She placed the money out of her power and control: she must be taken *prima facie* to have intended to part with the whole of the property; a trust having been declared, she could not recall it: *Petty v. Petty*, 22 L. J. N. S. Ch. 1065.

"The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest:" *Warriner v. Rogers*, L. R. 16 Eq. 340, 348.

The property being dealt with was money. The purpose of the settlor was to constitute the Toronto General Trusts Corporation trustees of this money for the defendants. That purpose is evidenced by the guarantee investment receipts, as well as by the statement of Mr. Clendinnen, the accountant of the trusts corporation. The fact that the documents evidencing the trust remained in the possession of the settlor did not prevent the trust being complete and executed. These receipts were not the instruments creating the trust; they were merely evidence of the trust created by the handing over of the money to and its acceptance by the trusts corporation. If a deed constituting a trust once delivered and executed is effectual, though held by the settlor (*Fletcher v. Fletcher*, 4 Hare 67, 69), *a fortiori* a trust completely declared is operative, though the acknow-

ledgment of the existence of the trust in documentary form be retained by the settlor.

The property, the subject of the trust, had been delivered to the trustees, and the trustees had accepted it upon the trust. The trust was thus made complete and enforceable: *Wheatley v. Purr*, 1 Keen 551; *Stapleton v. Stapleton*, 14 Sim. 186; *Vandenberg v. Palmer*, 4 K. & J. 204. Though not necessary to the completeness or efficacy of the trust, its existence was communicated to the beneficiaries, and was recognized by them, and by the settlor, in the subsequent dealings with the income cheques: *Standing v. Bowring*, 31 Ch. D. 282.

"Where the relation of trustee and cestui que trust is constituted, as where property is transferred from the author of the trust into the name of the trustee so that he has lost all power of disposition over it, and the transaction is complete as regards him, the trustee having accepted the trust, cannot say he holds it except for the purposes of the trust, and the Court will enforce the trust at the suit of a volunteer." *Fletcher v. Fletcher*, 4 Hare at p. 74. The fact that the income was received by Mrs. Phelan during her lifetime, whether pursuant to an arrangement made contemporaneously with the creation of the trust or by the goodwill of the beneficiaries when they received their income cheques, does not affect the validity or enforceability of the trust of the corpus in their favour. An instance of retention of income by a donor is to be found in *Standing v. Bowring*, *ubi supra*.

I have carefully considered all the authorities cited by Mr. Gorman as well as those referred to by Mr. Fisher. I find nothing to raise any doubt that there was in this instance a complete and executed trust created by Mrs. Phelan, enforceable by the defendants, the cestuis que trust.

There will, therefore, be judgment for defendants upon the issue, with costs to be paid by the plaintiffs out of the estate of Joanna Phelan in their hands. The question was, however, properly raised by plaintiffs, in view of the claim made by the residuary legatee and the finding of the receipts amongst the effects of the deceased, and they should have their costs out of the estate in their hands: *Wheatley v. Purr*, 1 Keen at p. 558.

MAY 30TH, 1907.

DIVISIONAL COURT.

COPELAND-CHATTERSON CO. v. BUSINESS
SYSTEMS LIMITED.

Contempt of Court—Disobedience of Injunction—Wilful Contempt—Company—Sequestration—Effect of Appeal to Court of Appeal from Judgment Containing Injunction—Order of Judge of Court of Appeal Staying Operation of Injunction—Stay of Proceedings in Court below—Jurisdiction to Entertain Motion for Sequestration—Process of Contempt—Securing Obedience to Injunction—Power to Punish—Locus Poenitentiae.

Appeal by defendants from order of MULOCK, C.J., 9 O. W. R. 610, upon an application by plaintiffs for an order directing the issue of a writ of sequestration against the estate of defendants (an incorporated company) for contempt of Court.

W. E. Middleton, for defendants.

W. E. Raney, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., MABEE, J.), was delivered by

MEREDITH, C.J.:—The order appealed from recites that defendants by their counsel admitted a breach of the injunction as set out in the notice of motion for the order, and that they had been found guilty of contempt of the Court by "disobeying the injunction contained in the judgment pronounced in this action on the 22nd day of December, 1906, by making binders, holders, and sheets in imitation of the binders, holders, and sheets of the plaintiffs, contrary to the terms of the said judgment as set out in paragraph 24 thereof," and that plaintiffs were entitled to the issue of an order for a writ of sequestration as claimed in the notice of motion served, but that a stay of the issue of the writ had been directed to give defendants an opportunity of purging their contempt by presenting to the Court a satisfactory written apology, by making proper reparation for their act of disobedience, and by paying plaintiffs' costs

of the motion and of the reference directed by the Court in that event to be had, as between solicitor and client, and that in the event of defendants electing to present an apology to the Court and to comply with the directions of the Court, they should pay into Court by way of a fine a sum equal to their profits accruing from sales made in breach of the injunction down to 4th March, 1907, and that if such profits should be found to amount to less than \$250, they should pay a fine of \$250, and that, though the fine was a sum equal to the profits, its payment should not be regarded as a disposition of the profits themselves, and that defendants might on or before 6th April, 1907, elect to purge their contempt on the terms mentioned by filing a notice of their election with the registrar, and that thereupon there should be a reference to the Master in Ordinary to ascertain the profits accruing from sales made in breach of the injunction between 22nd January, 1907, and 4th March, 1907, and that in default of such election the writ of sequestration should issue, and that defendants should forthwith after taxation pay the costs of the motion as between solicitor and client, and that defendants had filed a notice, but that it was not an election pursuant to the terms of the judgment.

The order then directs the issue of a writ of sequestration, directed to the sheriff of the city of Toronto, to sequester the goods, chattels, and personal estate, and the rents and profits of the lands and tenements, of Business Systems Limited, the defendants, and to retain and keep the same under sequestration until the Court should make other order to the contrary; and the order further directs defendants forthwith to file with the registrar an account in writing and verified by affidavit of the binders, holders, and sheets made by them between 22nd December, 1906, and 4th March, 1907, in imitation of the binders, holders, and sheets of plaintiffs, and that the costs of the motion, to be taxed between solicitor and client, be paid forthwith after taxation by the defendants to the plaintiffs.

The 24th paragraph of the judgment is as follows: "24. And this Court doth further order and adjudge that defendants, their and each of their servants, agents, and workmen, be and they are hereby perpetually restrained from making binders, holders, or sheets in imitation of the said binders, holders, and sheets of plaintiffs."

The entry of judgment was stayed by the trial Judge for 30 days, and having obtained on 8th January, 1907, leave to appeal directly to the Court of Appeal, the defendants gave notice of appeal from the judgment of the Court of Appeal, and on 12th January, 1907, paid into Court \$200 as security for costs under Con. Rule 826; on 12th February, 1907, they served notice of an application to Moss, C.J.O., for a stay of the operation of the injunction proceedings (Rule 827 (1d)), returnable on 16th February. On the return of this motion, at the request of plaintiffs, an enlargement was granted until 20th February, 1907. The motion was argued on the 20th and 21st of the same month, and on 4th March, 1907, judgment was given by Moss, C.J.O. (9 O. W. R. 390), granting the stay upon the undertaking of defendants to keep and file an accurate account of all sales and transactions in respect of binders, holders, and sheets, as specified in paragraph 24 of the judgment, made or entered into by them.

The notice of motion for the writ of sequestration was served on 22nd February, 1907.

Two grounds of objection to the order appealed from were argued by counsel for defendants:—

1. That the effect of the order of Moss, C.J.O., of 4th March, 1907, and of Con. Rule 829 was to stay all further proceedings in the action unless otherwise ordered by the Court of Appeal or a Judge of that Court, and that no leave having been obtained from the Court of Appeal, or a Judge of that Court, to make the motion for a writ of sequestration, Mulock, C.J., had no right or jurisdiction to entertain the motion or to make the order appealed from.

2. That Mulock, C.J., erred in assuming that process of contempt for the breach of the injunction is punitive in its character, that it is really a means of securing obedience to the injunction, and that, as the operation of the injunction had been stayed, no order should have been made.

Unless where the judgment appealed from awards a mandamus or injunction, in the case of a motion by way of appeal to the Court of Appeal, the execution of the judgment or order appealed from is stayed pending the appeal as soon as the security provided for by Rule 826 is allowed: Con. Rule 827 (1); but the Court or a Judge in the excepted cases may order that execution be stayed: Con. Rule 827 (2).

Rule 829 provides that "where execution of the judgment or order appealed from has become stayed, all further proceedings in the Court appealed from, other than the issue of the judgment or order and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by the Court appealed to or a Judge thereof."

The order of the Chief Justice of Ontario does not in terms stay the execution of the judgment; its language is, "that the operation of the judgment appealed from herein restraining the defendants from making binders, holders, and sheets, in imitation of the binders, holders, and sheets made by plaintiffs, be stayed pending the hearing and disposition of the defendants' appeal to this Court from the judgment aforesaid."

Execution of the judgment not having been stayed by force of Rule 827, it is not stayed unless the order of Moss, C.J.O., has the effect of staying it, and it appears to me that his order has not that effect. As I read the order, all that is stayed is the operation of so much of the judgment as restrains defendants from making binders, holders, and sheets, in imitation of the binders, holders, and sheets of plaintiffs, and Rule 829, which applies only where execution of the judgment or order appealed from has become stayed, has therefore, I think, no application. Indeed it may be open to question whether the Rule applies unless execution has become stayed by the automatic operation of the Rule, and it may well be that the framer of the Rules thought that where an order for the stay was necessary, the terms of the order would provide what effect it should have on the right of the parties to take further proceedings on the judgment.

[Reference to McLaren v. Caldwell, 6 A. R. 456, remarks of Burton, J.A., at p. 494.]

It was probably in view of this opinion . . . that the order of Moss, C.J.O., directs not that "execution" of the judgment but "the operation" of the judgment should be stayed.

Rule 830 being, in my opinion, for these reasons, inapplicable, there was nothing to take away the jurisdiction of the High Court to entertain an application by plaintiffs for an order for a writ of sequestration because of the disobedience of defendants in disregarding the prohibition contained in paragraph 24 of the judgment, while the operation

of that part of the judgment was not stayed—that is, between the expiry of the 30 days' stay granted by the trial Judge and 4th March, 1907, when the stay was granted by Moss, C.J.O.

It was strenuously urged by Mr. Middleton that it would be a great injustice to defendants, who were dissatisfied with the judgment and had appealed against it, that they should be required to obey the mandate of the Court contained in paragraph 24 of the judgment, at the peril of being liable to be punished for contempt, and that too where the case was one in which a Judge of the Court of Appeal had determined that it was proper that the operation of the judgment should be stayed pending the appeal, and had accordingly granted such a stay. With the hardships of a practice leading to such a result, we have nothing to do, but there was no reason why the defendants should have incurred that risk. They might have yielded obedience to the judgment while it was operative, and, if that would have involved serious loss, they might have obtained an extension of the stay granted by the trial Judge, or have procured a stay from the Court of Appeal, or a Judge of that Court, before the expiry of the stay granted by the trial Judge. They were in a position to move for such a stay at any time after 12th January, 1907, and, if the disposition of the motion had been delayed owing to plaintiffs asking enlargements of it, terms might have been imposed on them which would have protected defendants from incurring any penalty for contempt in not in the meantime yielding obedience to the judgment. . . .

[Reference to *McGarvey v. Town of Strathroy*, 6 O. R. 138; *McLaren v. Caldwell*, 29 Gr. 438; *Dundas v. Hamilton and Milton Road Co.*, 19 Gr. 455.]

The first ground of appeal, in my opinion, fails.

The second ground, in my opinion, also fails.

I do not propose going through the cases cited by Mr. Middleton, all of which I have read. Several of them deal with the exercise by the Court of its jurisdiction to punish for contempt not committed in the face of the Court, and point out that this jurisdiction should be exercised sparingly, and only where the public interests require that it should be exercised. In all this I entirely agree, but it does not help much, if at all, to the solution of the question whether the order of Mulock, C.J., was rightly made in this case.

Nor is much assistance derived from the cases in which a distinction between a contempt which is punishable as a crime and one not so punishable is considered and pointed out. . . .

[Reference to remarks of Lindley and Lopes, L.JJ., in *O'Shea v. O'Shea*, 15 P. D. 59, 64; *In re Freston*, 11 Q. B. D. 545, 556, 557; *Harvey v. Harvey*, 26 Ch. D. 644, 654; *In re Tuck*, [1896] 1 Ch. 692, 696; *D. v. A. & Co.*, [1900] 1 Ch. 484; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; *Berry v. Donovan*, 21 A. R. 14; *Kerr on Injunctions*, 4th ed., p. 593 et seq.]

The objections to the jurisdiction of Mulock, C.J., to make the order failing, and the Court being of opinion that the jurisdiction included power to punish for a wilful breach of the prohibition of the injunction, it follows that the appeal fails and must be dismissed with costs.

The defendants should, however, have a further day of grace granted to them to comply with the terms upon which the issue of the writ of sequestration should be suspended, and they will be allowed until 4th June to file with the registrar a notice of their election to comply with the terms mentioned in the recitals in the order appealed from, and in the event of their doing so they should have liberty, on proper terms, to apply to vary the order appealed from so as to make it such an order as would have been made if they had filed a proper notice of their election within the time limited by the order.

MAY 30TH, 1907.

DIVISIONAL COURT.

MUNRO v. SMITH.

MACKIE v. SMITH.

RICHARDSON v. SMITH.

Mines and Minerals — Ontario Mines Act, 1906 — Application to Record Staking out of Mining Claim—Duty of Mining Recorder to Receive—Ministerial Act—Result of Failure to Record—Rights of Applicants—Previous Adverse Claims Undisposed of—Bar to Recording Fresh Claims—Affidavit—Form—Construction of Act.

Appeals by defendant Smith, the mining recorder of the Temiskaming mining division, from orders of ANGLIN, J.,

8 O. W. R. 452, requiring the appellant, pursuant to the Mines Act, 1906, to accept the applications of the several plaintiffs for certain mining claims tendered to the appellant.

J. R. Cartwright, K.C., and W. D. McPherson, for the appellant.

J. Bicknell, K.C., for plaintiffs Munro and Mackie.

Grayson Smith, for plaintiff Richardson.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., MABEE, J.), was delivered by

MEREDITH, C.J.:—The question for decision is whether a mining recorder is warranted by the Mines Act, 1906, in refusing to receive an application to record the staking out of a mining claim, otherwise in proper form, when presented to him under the provisions of sec. 156 of the Act, because an application has already been received by the mining recorder to record the staking out by another person of the same mining claim; in other words, whether, after an application has been received, the mining recorder may refuse to receive an application from another person to record his staking out of the same claim until the first application has been disposed of, and unless it is disposed of adversely to the application.

I agree with my brother Anglin's view that the duty of the mining recorder under sec. 156 is a purely ministerial one, and that if the conditions mentioned in the section are complied with by the applicant, it is the duty of the mining recorder to receive his application in order that it may be dealt with by him under the provisions of the Act, unless the contention of the appellant to which I have referred is well founded.

It is extremely difficult for me to reconcile with one another all the provisions of the Act bearing upon the question to be determined, but, after the best consideration I have been able to give to the matter, I have reached the conclusion that the contention of the appellant is not entitled to prevail.

It is important for the determination of the question to ascertain what are the rights, if any, acquired by the lodging

with the mining recorder of an application to record the staking out of a mining claim.

Turning back to the group of sections headed "Mining Recorders, their Duties and Powers," it will be found that sec. 55 deals with the books to be kept by the mining recorder for recording claims, "and other entries therein as may be prescribed by the Minister." Section 58, though not very artistically framed, requires the mining recorder, forthwith after the presentation by a licensee of "an application for a claim," to enter in the proper book in his office the particulars of the application, and to file the application, sketch or plan, and affidavit (what these are is to be found by reference to sec. 156) with the records in his office, and that "if within 60 days of the date of the recording of a mining claim staked out after the passage of the Act, no dispute as to the rights of the licensee to the claim by reason of prior discovery or otherwise, has been lodged with the mining recorder, he may grant to the licensee a certificate" of the record of the staking out of a mining claim. By sec. 59 the applicant is at the time of the application to produce his miner's license to the mining recorder to whom the application is made, and the mining recorder is to indorse and sign upon the back of it a note in writing of each and every "such record made to such licensee," and the record is not to be complete or effective unless and until the indorsement is made and signed on the license. And by sec. 60 "any question or dispute as to non-compliance with the provisions of the Act regarding a mining claim prior to the issue of a certificate of record of staking out," is to be adjudicated on by the mining recorder subject to an appeal to the Mining Commissioner.

Section 140 provides as follows: "The application of a licensee for a record of the staking out of a mining claim shall not be deemed to confer any right whatsoever upon the licensee until such time as the staking out of the said mining claim shall have been recorded with a mining recorder, and a certificate of such record issued and delivered by the mining recorder to the licensee or some person on behalf of the licensee."

There is an apparent inconsistency between the provisions of this section and those of sec. 160, to which reference has been made, in that the requirement of the latter is that

the respective periods mentioned in it within which work is to be done by the licensee are reckoned immediately following the recording of the staking out of the mining claim.

The object of the provisions of sec. 160 is, I think, plainly to impose obligations to perform the work in order that the licensee may not be permitted, having secured the mining claim, to let it remain undeveloped, and it is somewhat singular that nowhere in the Act, as far as I have been able to ascertain, is there anything which defines or declares what rights a licensee who has recorded the staking out of a mineral claim and has obtained a certificate of the record of it, acquires in the land which is the subject of the claim before he obtains his patent for it, unless it be sec. 132, which provides that a person who in accordance with the provisions of the section stakes out a mining claim shall have the right to work the same and transfer the interest therein of a licensee to another licensee.

Section 160 must, I think, be read as meaning that the periods mentioned in it are to be reckoned from the recording of the staking out of the claim and the granting of the certificate of the record of it. The language of sec. 140 is clear and explicit, and secs. 132 and 160 must be read so as not to conflict with its provisions, and, when it is borne in mind that until the certificate is issued, the right of the licensee is not established, and it may turn out that his claim is an unfounded one, it would be most unlikely that it was intended to give him the right, and indeed to impose upon him the duty, of performing work involving considerable outlay, and apparently to give him the right to appropriate to his own use the minerals he might win in the course of his mining operations, until his claim has been established and the certificate of record has been delivered to him.

The form of the report which, by sec. 161, the licensee is to make of the work done by him, as required by sec. 160 (form 17), describes the licensee as the holder of the mining claim, which would, I think, be an inaccurate description of one who had not obtained a certificate of the record of his staking out, for until then he is merely an applicant for a record of his staking out, and he has, according to sec. 140, no right whatever until the certificate of record has been issued and delivered.

Section 71 may also be referred to. It makes the certificate of record when delivered, in the absence of fraud, final and conclusive evidence of the performance of all requirements of the Act except working conditions up to "that time," and makes the certificate, in the absence of fraud, not liable to forfeiture except for breach or non-compliance with the provisions of the Act in respect to work required by the Act to be thereafter performed on the mining claim.

If I am right in this view as to the position of the applicant for the record of the staking out of a mining claim, one would not expect that the filing of an application by, it might be, one who had no right whatever to a certificate of record, whose affidavit might be a tissue of falsehoods, should have the effect of defeating an honest claimant who was the real discoverer and had complied with the provisions of the Act, but had not succeeded in getting in his application until after the fraudulent applicant had reached the mining recorder's office and filed his application.

It may be said that there is no limit fixed after the discovery of valuable mineral for the staking out of the claim by the discoverer, and that in the case suggested, after the claim of the fraudulent applicant has been disposed of by the mining recorder, the discoverer may stake out his claim and file his application; but what is there to prevent some one else, after a disposition of the application has been made, going to the locality and doing just what has been done by his predecessor, if only he succeeds in getting to the locality before the true discoverer reaches it, and by a repetition of these methods the opportunity of the true discoverer to acquire any right to the claim being indefinitely postponed?

It appears to me that it is a much more reasonable construction to give to the Act, to interpret it as entitling any one who desires to do so, and complies with the provisions of sec. 156, to lodge his application with the mining recorder. What harm would such a course occasion to any one? The mining recorder would have all the claimants before him and would be in a position to settle all disputes and to grant to the person found to be entitled the certificate of record, instead of dealing with each claim separately, which, if there were many claimants, would cause long

delay, for at least 60 days must elapse between the receipt of each application and the disposition of it.

Section 132, which confers on a licensee who discovers valuable mineral in place the right to stake out thereon a mining claim, is, no doubt, qualified by the provision in these words, "provided that it is on Crown lands not withdrawn from location or exploration, and is not included in a claim staked out by another licensee or on lands the mines, minerals, and mining rights whereof have been reserved by the Crown."

This provision was relied on by Mr. McPherson as supporting the contention of the appellant that only one staking out was permissible, and that when once a claim was staked out it was in effect withdrawn from further staking out.

This argument, however, proves too much, for, if well founded, though the original staker-out had omitted for 15 days after staking out his claim to apply for the record of his staking-out under the provisions of sec. 156, and even if his claim were disallowed under the provisions of sec. 58, it would be impossible for any one else, though he were the first discoverer of valuable minerals in place, to stake out a claim.

I see no reason why this provision should not be read as meaning that there shall be no staking out of a claim where one already has been staked out, and a certificate of the record of the staking out has been issued and delivered.

If this be not the true meaning of the provision, the real discoverer would be prevented from staking out his claim if some more alert and unscrupulous licensee should succeed in staking out the claim before the real discoverer had done so.

This view of the meaning of the provision is strengthened if it be, as I have said in my opinion it is, that the right to work the claim mentioned in the concluding part of sec. 132 does not arise until the certificate of the record of the staking out of the claim is issued and delivered.

Upon the whole, I am of opinion that it was the duty of the appellant to receive the applications of plaintiffs as applications under secs. 58 and 156, in order that they might be considered and dealt with by him under the provisions of the Act.

Even if I had come to a different conclusion as to this, I should still be of opinion that the appellant was bound to receive the applications at all events as being objections to the granting of a certificate of record to the person whose application had been filed: sec. 58.

The difficulties which have arisen in this case will not occur in the future, for at the last session of the legislature the Mines Act, 1906, was amended by providing that the particulars of applications are not to be entered by the mining recorder if a prior application is already recorded for the same claim or any substantial part of it (sec. 13 (1)), and by changes in secs. 131 and 132 which give a right to stake out a claim on such lands as are mentioned in sec. 131 "if and only if the same are not at the time within any of the following descriptions, namely: (1) under staking or record as a mining claim, special mining claim, or placer mining claim not expired, lapsed, abandoned, or cancelled; (2) under an existing working permit; or (3) withdrawn. . ."

I cannot part with the case without pointing out that the expressions used in the Act as to "recording" indicate careless drafting.

In sec. 55, which refers to the books to be kept by mining recorders, the books are spoken of as being "for the recording of mining claims;" in the same section the recorder is to mark on his map "the claims as they are taken up and recorded;" sec. 58 speaks of "the recording of a mining claim;" sec. 59 speaks of the application as being "to record the staking out of a mining claim;" sec. 60 uses the expression "certificate of record of staking out;" sec. 67 speaks of "the certificate of record of the staking out thereof;" sec. 71 uses the expression "certificate of record of any mining claim;" sec. 109 says "no mining claim shall be staked out or recorded;" sec. 122 speaks of a certificate of record of the staking out of a mining claim; sec. 130 (1) speaks of recording a mining claim; sec. 140 goes back to the expression "for a record of the staking out of a mining claim." The group of sections commencing with 156 is headed "recording mining claims;" then sec. 159 speaks of a "recorded owner or holder" of an unpatented mining claim; sec. 160 (1) speaks of recording a mining claim, while sub-sec. 3 of the same section goes back to the expression "record of the staking of a mining claim;" sec. 166 reverts to the expres-

sion "recording of a mining claim;" form 13 describes the application under sec. 156 as an "application to record the staking out of a claim"—and that is what, according to the form, the applicant is to ask for.

All these varying expressions are intended to mean the same thing, and it is to be hoped that when the Act is consolidated or a revision of it takes place, an attempt will be made to use always the same expression when the same thing is meant.

The appeal must be dismissed with costs.

THE
ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JUNE 8TH, 1907).

VOL. X.

TORONTO, JUNE 13, 1907.

No. 4

CARTWRIGHT, MASTER.

MAY 31ST, 1907.

CHAMBERS.

CONSUMERS GAS CO. v. TORONTO R. W. CO.

*Particulars—Statement of Claim—Injury to Plaintiffs' Pipes
by Escape of Electricity from Defendants' Works—Defences
—Damages.*

Motion by defendants for particulars of statement of claim before delivery of defence.

D. L. McCarthy, for defendants.

E. D. Armour, K.C., for plaintiffs.

THE MASTER:—The statement of claim covers 5 type-written pages. In view of the terms of Rule 268, it would not be thought that it was too "concise," at least until shewn to be so. It alleges in substance that the pipes of plaintiffs have been injured by electricity escaping from the railway system of defendants, because the latter have "failed to adopt and use necessary, reasonable, and proper precautions to safely confine the same to their own wires and apparatus," but have negligently allowed the same to escape through the ground, and, "in consequence, enter into, pass through, and leave at different points the mains and pipes of the plaintiffs, to the serious injury and detriment of the pipes, mains, and property of the plaintiffs." The plaintiffs further charge that defendants have increased the amount of electricity passing through the pipes of the plaintiffs, by connecting them with the rails by means of bonding wires.

against the wish of the plaintiffs; that defendants have at various times deposited salt upon or near the rails, whereby greater currents of electricity escape, and aggravate the damages complained of; and that, as the result of the preceding alleged wrongful acts of defendants, the plaintiffs' pipes have been injured, causing the loss of large quantities of gas and the expenditure of large sums for repairs. The particulars asked for cover nearly two typewritten pages and are divided into 16 different heads. A specimen of one of the shortest demands is as follows: it shews the character of what is demanded as to the others even more extensively. Under par. 10 of the statement of claim, which charges the deposit of salt, these particulars are asked: (a) At what times and the exact places where the defendants deposited salt upon and in the neighbourhood of their rails. (b) At what places the mains and pipes of plaintiffs have been damaged in consequence of the deposit of salt by defendants. If the plaintiffs know of any places where salt has been so sprinkled, or of any places where the bonding complained of has taken place, they may not object so say so, but I cannot order this to be done. The only particulars that should be given are of the "neighbouring municipalities" mentioned in par. 8, and of the amount already expended for repairs as mentioned in par. 12.

The only defences, as it seems to me, that can be raised, or that are necessary to defeat the plaintiffs' claims, are these: (1) denial of any wrongful escape of electricity; (2) denial of any damage to plaintiffs' pipes having been caused by such escape, if any there was; (3) denial of bonding of defendants' rails to plaintiffs' pipes; (4) leave and license to do so, if it was done; (5) denial of injury resulting therefrom in any event; (6) denial of sprinkling of salt; (7) denial of any resulting injury; and (8) denial of any liability for such injury, if proved to have been caused thereby.

After consideration, I am unable to see how any other of the particulars asked for can be necessary to enable defendants to plead. It surely is plain enough what plaintiffs are asking, and on what grounds the claim is based. The case cited on the argument of *East and South African Telegraph Co. v. Cape Town Tramway Co.*, [1902] A. C. 381, is very similar in its facts, assuming that the plaintiffs' allegations can be proved. In the judgment, at p. 392, it was

said: "Electricity (in the quantity which we are now dealing with) is capable, when uncontrolled, of producing injury to life and limb, and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands v. Fletcher*, L. R. 3 H. L. 330, and the principle would apply."

Here plaintiffs allege serious and continuing damage to their property. This must be proved, to entitle them to recover from defendants, and this is the material fact on which plaintiffs must rely. The other allegations of wrongful bonding of the rails to the gas pipes, and of the sprinkling of salt, are in one respect no more than evidence of plaintiffs' right to recover, though in another they may be part of the cause of action. Even if they are viewed as evidence, they could not be objected to as improperly pleaded under the decision in *Millington v. Loring*, 6 Q. B. D. 190. In neither view is there any necessity for particulars as to these.

Except as already stated, the motion cannot be granted, at this stage of the action at least. The only issues that are likely to be dealt with at the trial will be: (1) whether the pipes of the plaintiffs have been damaged by electrolysis as alleged; and (2), if so, whether defendants are for any reason liable to plaintiffs therefor.

If these questions are both answered affirmatively, then the quantum of damages payable must be determined by a referee. This, I understood, was conceded on the argument.

No doubt, when that stage is reached, it will be necessary for plaintiffs to give some evidence, such as is asked for in the demand for particulars, e.g., as to the escape of gas owing to the weakening of the pipes, and as to the ascertained and probable damage to plaintiffs' property resulting from electrolysis.

At present, however, such details are not, in my opinion, necessary, nor can they be usefully considered until the primary question of liability has been finally determined. This may not be reached until a somewhat remote period in this novel case; especially when a similar claim is being made by the corporation of the city of Toronto for damage to their water pipes.

Defendants should plead in 8 days (or such further time as may be agreed on).

The costs of the motion will be in the cause, as the action is of an unusual character.

TEETZEL, J.

JUNE 3RD, 1907.

WEEKLY COURT.

RE CHILDS.

Trusts and Trustees—Sale of Unproductive Land—Purchase Money—Apportionment—Tenant for Life—Income—Capital—Interest—Costs.

Motion by the tenant for life under the trusts of a will for an order and direction as to whether or not any portion, and, if any, what portion, of the purchase price of certain lands included in the trusts, was payable to the applicant.

W. T. Evans, Hamilton, for the applicant.

W. Bell, Hamilton, for the executor.

G. C. Thomson, Hamilton, for the Boys' Home.

W. W. Osborne, Hamilton, for the Aged Women's Home.

J. L. Counsell, Hamilton, for the Girls' Home.

TEETZEL, J.:—I think this matter is governed by *Re Clarke*, 6 O. L. R. 551, 2 O. W. R. 980, following *In re Cameron*, 2 O. L. R. 756, and *Walters v. Solicitor for the Treasury*, [1900] 2 Ch. 107; and therefore the life tenant, Mrs. Carry, is entitled to an apportionment of the \$2,500.

The registrar will ascertain what sum invested at the testator's death (30th April, 1894), would have produced \$2,500 when the land was sold, interest being calculated at $4\frac{1}{2}$ per cent. per annum with half-yearly rests. The sum so ascertained will represent capital, and will be deducted from the \$2,500, and the balance will represent deferred income, and will be payable to the applicant.

I make no order respecting other sales of unproductive real estate heretofore made, as there is not sufficient material filed to enable me to do so satisfactorily. Nor shall I make directions as to future sales.

Costs of all parties to be deducted in equal portions from the respective sums ascertained to represent capital and deferred income.

BOYD, C.

JUNE 3RD, 1907.

TRIAL.

PETERBOROUGH HYDRAULIC CO. v. McALLISTER.

Landlord and Tenant—Action for Rent—Claim for Indemnity—Agreement between Tenant and Bank—Disposal of Business—Authority of Agent of Bank—Assumption of Liabilities—Implied Obligation to Pay Rent—Transferees of Lease—Power of Bank to Carry on Business—Covenant of Tenant not to Assign without Leave—Tacit Leave.

Action for rent, and claim over by defendants against the Ontario Bank, third parties, for indemnity against the payment of the rent.

BOYD, C.:—The McAllisters, partners under the name of the McAllister Milling Co., are lessees from plaintiffs for 10 years from January, 1903, of a milling property, at the rent of \$3,000 yearly, payable quarterly. . . . The action is to recover three months' rent, \$750, which is payable in advance on 1st January, 1907. The McAllisters are liable on this by reason of their covenant to pay, but they claim to be indemnified against such payment by the Ontario Bank, brought in as third parties. The lease provides that the McAllisters will not assign without leave except to a limited liability company in which the lessees shall be interested—an exception not now material.

The McAllisters became heavily indebted to the bank, and, not being able to pay, an arrangement was made by which, in brief, upon payment of \$10,000 cash and the transfer of all the partnership assets to the bank, the partners should be discharged from all liabilities. In detail the matter was carried out by a series of documents prepared by the solicitor for the bank, pursuant to the agreement arrived at between the general manager of the bank at Toronto (McGill) and Mr. McAllister.

The first document is an agreement of 19th September, 1905, between the McAllister Co. and the bank, in which, after appropriate recitals, it is agreed: (1) that the company thereby surrender to the bank all their right, title, and interest in the assets of the company and agree to assign to the bank their lease of the milling property: (2) that the company shall pay to the bank forthwith \$10,000—the bank assuming payment of certain of the company's liabilities, as particularly set out in attached memorandum, and will honour the company's cheques when issued in payment of such liabilities: (3) the company agree to execute such further assignments and assurances as may be necessary to vest in the bank all of the said assets: (4) in consideration whereof the bank shall forthwith release the McAllisters from all further liability, and in the event of the business being hereafter carried on in the name of the said company (as provided in contemporaneous agreement) or in any similar way, the bank agrees to indemnify the company . . . against any and all liabilities then or thereby incurred.

This document is executed by the McAllisters and by Mr. Crane, the local manager at Peterborough of the bank, and the solicitor of the bank is the witness. The memorandum annexed contains only the book debts of the company amounting to \$4,217 and any outstanding grain tickets.

The agreement of the same date as to the bargain is between Charles McAllister and the bank, and recites that it is made for the more convenient liquidation of the partnership assets and with a view of disposing of the company's business as a going concern. It provides that McAllister shall continue to carry on the business under the name of the McAllister Co. and to manage the same as a going concern and collect book debts and reduce the amount due to the bank . . . having in view the intention to dispose of the business as a going concern at the earliest date possible; he is to get a salary of \$1,000 out of the business, which business is to be under the supervision of the local manager, who shall have access to the books, and to whom McAllister shall be accountable. The bank agree to indemnify the company against any liability incurred while the business is being continued in the company's name.

This document is signed by Charles McAllister and the local manager of the bank before the same witness.

The last of the series is a general release of all demands—a mutual release down to the date of it, which is 19th September, 1905, and is made between the McAllisters and the bank, and contains this recital: "Whereas the McAllisters are indebted to the bank in the sum of \$62,900, and, being unable to pay in full, have by instrument of even date herewith surrendered to the bank all their firm assets, and have also paid the sum of \$10,000 in consideration that the bank would release the firm and the individuals from all liabilities. This is signed by the McAllisters, and also by the general manager of the bank, and the corporate seal is duly attached.

This concluding document, incorporating the provisions of both the others, duly executed by the bank, displaces the argument addressed to me that the agreement relied on was not binding upon the bank. Apart from this, I think the whole course of the proceedings prior and subsequent to the signing of the papers shews that the agent who signed was acting not without authority, and his action was, besides, adopted and ratified by the bank.

I think it may also be properly concluded that the subsequent liability which might arise as to accruing rent was not provided for expressly in any of the papers. It was not intended to be included in the schedule of current or existing claims which were to be paid forthwith by the cheque of the company, and it is not contemplated in the liabilities incurred in the course of the prosecution of the business, after the bank had become transferees of the property, and against which the bank indemnifies. The claim for subsequent rent, which may arise though no subsequent business is prosecuted, appears to me to lie outside of these expressed provisions.

There is evidence, not contradicted, that McAllister mentioned the matter of future rent during the negotiations as a thing he was not to pay, and there is also the emphatic testimony of the solicitor for the bank that McAllister was to be indemnified against all liabilities connected with the business. This evidence goes to establish that there is no obstacle interfering with any implied obligation which may arise out of the nature of the transaction.

The only other facts which need be referred to are that the business was carried on by McAllister under the supervision and for the benefit of the bank for 6 months—that he was succeeded by another appointee of the bank, who

appears to have been in charge till the business was closed at the end of 1906.

In July, 1906, at the instance of the bank, the McAllisters gave a power of attorney to the local manager empowering him to execute any deed of assignment or surrender of the lease. McAllister also on behalf of the bank arranged with the lessors that they should consent to an assignment of the lease to a third party, to whom the property should be disposed of by the bank. But no purchaser or third party could be found up to the time in September, 1906, when the bank, becoming involved in financial embarrassment, suspended payment and became subject to the supervisory powers of a curator (see R. S. C. 1906 ch. 29, sec. 2), or of some functionary directed by the Bank of Montreal, for the evidence is not clear as to what exactly happened. There is no proof, however, that there has been any change in the legal or equitable control of the Ontario Bank over the property and leasehold term now under discussion. The business was ended apparently by this officer under the Bank of Montreal, who paid the last gale of rent up to the end of 1906, and sent back the keys to the lessors in the name of the McAllister Co.

This, I think, clears the way to consider the results and the legal situation. Upon the facts, I think the proper conclusion is, that the bank became the lawful transferees of the lease, and thereafter managed and controlled the leasehold premises for their own advantage. Though active possession of the mill premises ceased at the end of 1906, the right to possession and to resume active operations or to dispose of the property rests with the bank. The McAllisters certainly have no right to enter thereon, as against the bank.

The objection raised as to the agreement not being binding on the bank, I have already considered and dealt with. The next objection strongly urged was that the action of the bank in carrying on the business was ultra vires, having regard to sec. 76 (2 a) of the Bank Act, R. S. C. 1906 ch. 29: "Except as authorized by this Act, the bank shall not either directly or indirectly engage or be engaged in any trade or business whatsoever."

There is no express provision in the statute authorizing the bank to do what was done in this case, that is, to take

a transfer of property in satisfaction of an existing debt which the customer is unable to pay otherwise. The Act relates to the taking of securities, etc., but looking at sec. 81 particularly, as well as other sections, it appears that the bank can purchase the property of its debtor under execution or insolvency just as any individual might do, and may take, hold, and dispose of the same at pleasure. It has also been held that the bank have power to compound a claim when the exigencies of business require that to be done: *Bank of Commerce v. Jenkins*, 16 O. R. 215, 221. And when the bank have taken over the security for a debt already incurred, they may carry out such arrangement for its sale and disposition as the bank may think proper: In re *Rainy Lake Lumber Co.*, 15 A. R. 749; see also *Exchange Bank of Canada v. Fletcher*, 19 S. C. R. 278. It was competent, I think, for the bank to acquire these assets and to take the transfer absolutely of the leasehold, and as subsidiary to a favourable or profitable disposal or sale of the mill to keep it as a going concern for a reasonable time: see *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U. S. 122, and *Roebling v. First National Bank of Richmond*, 30 Fed. R. 744. Possibly, but for the bank's suspension of business, such a disposition would before this have been made of this concern. But, whether my view as to a going concern be correct or not, it does not seem to me that the bank can escape from the obligation of their position as transferees of the leasehold by invoking the doctrine of ultra vires or by objecting that this conduct of the business is not authorized or is forbidden by the statute. The bank have by the agreement to transfer become equitable owners of the leasehold, and can deal with it as owners by occupation or subletting or otherwise getting the benefit of it, and the McAllisters have no further right to its enjoyment. It is evident that the bank did not seek to have executed a formal deed of assignment, but were content to hold and control the right to have a transfer made to their nominee. It is objected that the bank were never entitled to the possession because no consent to any assignment to the bank has been given by the lessors. But the lessors have not refused such consent; on the contrary, knowing that the bank were handling the property after the McAllister settlement, the lessors accepted rent and are willing to accept the rent from the bank as it accrues from

time to time. The evidence indicates this, and it also appears that, on application being made to the lessors after McAllister had ceased to be manager for the bank, they signified their readiness to assign the lease to a third party. The local manager says he was aware that the lessors would assign to a third party as assignee or purchaser, but the trouble was to find the person.

Here the element which distinguishes the case relied on by the bank of *Crouch v. Tregonning*, L. R. 7 Ex. 88, is wanting. . . . The ground of Baron Bramwell's judgment is that the bargain was that a regular assignment of the term should be executed, and this was never done because the landlord's license which was required could not be obtained, and therein arose failure of consideration in respect of indemnifying the lessee.

The liability of the bank rests on the agreement to have the leasehold transferred, which can be carried out, and on the control which the bank exercise over the leasehold premises. It is not necessary that there should be actual and beneficial usufruct of the premises to render the bank liable. If they have the potential power to control the possession, that creates the implied obligation which arises out of the contract, though not expressed therein, so long as there is no evidence to negative that implication. If the agreement in question was carried out into details, the deed of assignment would be drawn so as to be subject to the payment of rent by the transferees. Even without these words "subject to payment," etc., there is the implied promise of the assignee of a lease to indemnify the original lessee. The effect of the assignment is that the lessee becomes a surety to the lessor for the assignee, who as between himself and the lessor is the principal, bound while he is assignee to pay the rent, and the surety after paying the rent has his remedy over against the principal. I have been just quoting from language approved of and given effect to by the Court of Exchequer in *Moule v. Garrett*, L. R. 5 Ex. 132, and affirmed in L. R. 7 Ex. 101. If a formal deed of transfer had to be executed, it would contain a covenant by the purchasers, the bank, to indemnify the vendor against the payment of the rent: see *Bridgman v. Daw*, 40 W. R. 253, and *Dodson v. Downey*, [1901] 2 Ch. 620, 623.

The conclusion I have reached is that the claim of the McAllisters to be indemnified by the bank against this payment of rent is established, and judgment should be so framed with costs to be paid by the bank.

FALCONBRIDGE, C.J.

JUNE 4TH, 1907.

CHAMBERS.

COLLINS v. TORONTO, HAMILTON, AND BUFFALO
R. W. CO.

PERKINS v. TORONTO, HAMILTON, AND BUFFALO
R. W. CO.

*Parties—Joinder of Defendants—Cause of Action—Joint
Liability—Tort.*

Appeals by defendants the Dominion Natural Gas Co. from orders of Master in Chambers, ante 84, dismissing appellants' motion for orders requiring plaintiffs to elect against which defendant they would proceed.

G. M. Clark, for appellants.

D. L. McCarthy, for the other defendants.

J. G. Farmer, Hamilton, for plaintiff Collins.

D'Arcy Martin, Hamilton, for plaintiff Perkins.

FALCONBRIDGE, C.J., dismissed the appeal with costs to be paid by appellants in any event.

RIDDELL, J.

JUNE 4TH, 1907.

TRIAL.

LUMSDEN v. TEMISKAMING AND NORTHERN
ONTARIO R. W. COMMISSION.

*Railway—Damages “Sustained by Reason of the Railway”—
Timber Cut for Construction of Railway—Limitation
Clause in Railway Act—Action not Brought within Six
Months.*

Action for damages for the cutting and taking of timber from certain lands under license to plaintiff.

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G. F. Henderson, Ottawa, for plaintiff.

D. E. Thomson, K.C., for the defendants the railway commission.

J. H. Moss, for defendant A. R. McDonell.

RIDDELL, J.:—Alexander Lumsden, the plaintiff, was the licensee of certain timber limits under the usual form of timber license issued by the department. The defendants the railway commission were incorporated by 2 Edw. VII. ch. 9 for the purpose of building a railway through the northern part of this province; defendant McDonell is a contractor under them. Before the filing of the plans and about June, 1903, the defendants entered upon the timber limits of Lumsden and cut certain timber—admittedly this was done in the course of constructing the projected railway. These acts continued down to a later period, but ceased much more than 6 months before the issue of the writ herein. Several defences were urged before me at the trial, but I need consider only one of these.

The Act of incorporation, 2 Edw. VII. ch. 9, provides, sec. 8, that the commission shall have in respect to the railway all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario. This Act, R. S. O. 1897 ch. 207, sec. 42, provides that "an action for damages or injury sustained by reason of the railway shall be instituted within 6 months next after the time of the supposed damage sustained." The corresponding section of the Dominion Railway Act, R. S. C. 1886 ch. 109, sec. 27, has been interpreted by the late Mr. Justice Street (venerable nomen!) and by the Court of Appeal in *McArthur v. Northern and Pacific Junction R. W. Co.*, 15 O. R. 733, 17 A. R. 86. Mr. Justice Street held that such damages as indemnity is sought for in this action were "sustained by reason of the railway," and this decision was affirmed by the Court of Appeal. It is true that the Court of Appeal was equally divided, but that is immaterial as regards an inferior Court. An inferior Court must follow the decision unless and until it should be overruled either by the Court of Appeal or some higher Court. . . . The "*Vera Cruz*," 9 P. D. 86, 91.

I do not think that Mr. Henderson succeeded in at all distinguishing the facts of this case from those in the *Mc-*

Arthur case; and therefore, without expressing any independent opinion of my own, I shall direct judgment to be entered dismissing this action with costs. . . .

CARTWRIGHT, MASTER.
FALCONBRIDGE, C.J.

JUNE 4TH, 1907.
JUNE 5TH, 1907.

CHAMBERS.

BRIGHAM v. McALLISTER.

Venue—Motion to Change—Residence of Parties—Nominal Plaintiff—Real Plaintiff—“Party”—Preponderance of Convenience—Witnesses—Expense—Costs.

Motion by defendants to change the venue from Owen Sound to Gore Bay.

J. E. Jones, for defendants.

R. C. H. Cassels, for plaintiff.

THE MASTER:—The plaintiff is suing as assignee of one Detwiller, who is a resident of Saskatchewan, where he has just been examined on commission. He there says that he will get all the benefit of this action if successful, as it is to be applied on another account between plaintiff and himself. He also says that the assignment was without consideration and was given to save him from a trip to Ontario. Incidentally it obviates the necessity of security for costs.

It is admitted that the cause of action, if any there be, arose in the district of Manitoulin Island.

On these facts it was argued that Detwiller is the real plaintiff, and that this case is within the principle of *Saskatchewan Land and Homestead Co. v. Leadley*, 9 O. L. R. 556, 5 O. W. R. 149, which I followed in *Appleyard v. Mulligan*, 6 O. W. R. 929.

It was contended in answer that Mr. Brigham and not Mr. Detwiller is “the party” to the action; that, if Detwiller had brought suit in his own name and laid the venue at Owen Sound, or wherever else he might happen to be in the province at the time, this could not be interfered

with, as was decided in *Campbell v. Doherty*, 18 P. R. 243, in the Court of Appeal.

It was submitted that in effect this was being done here, and that, therefore, the motion could not succeed under Rule 529 (b). Though examinable for discovery without order under Rule 441, Detwiller does not seem to be a "party" within the definition given in cl. 8 of sec. 2 of the Judicature Act.

I am not satisfied that the present comes within the principle of the *Saskatchewan* case, which I understand it was said by Sir W. R. Meredith, C.J., in dismissing the appeal in *Geedy v. Wabash R. R. Co.*, 9 O. W. R. 507, was not to be extended.

The real question seems to be whether Detwiller continued in defendants' service after 25th June, 1904. He says no salary was fixed, but that he was to get whatever he thought was right.

It is not apparent how there can be 5 or 6 witnesses on this, on either side, unless they heard admissions of the plaintiff or of the defendants to that effect, or to the contrary. But I cannot safely disregard plaintiff's affidavit, who swears to a balance of expense in favour of Owen Sound.

In view of this, and considering that the assizes at Gore Bay begin on 11th instant, while those at Owen Sound are a week later, I do not think the motion can succeed. The time for getting ready for a trial at Gore Bay is very short, and a change of venue might result in the case going over, though the defendants are willing to take short notice of trial. But the plaintiff would not be in default if he did not proceed at these sittings.

The costs of the motion will be in the cause; the extra costs (if any) of a trial at Owen Sound as against Gore Bay can be disposed of by the trial Judge.

An appeal from this decision, argued by the same counsel, was dismissed by FALCONBRIDGE, C.J.

RIDDELL, J.

JUNE 5TH, 1907.

TRIAL.

BULLEN v. NESBITT.

Will—Construction—Life Estate—Estate in Fee or Tail—Devise of Remainder to Children after Express Devise for Life—Rule in Shelley's Case—Purchaser from Mortgagee of Life Tenant—Title by Possession—Limitation of Actions—Ejectment—Defence—Mesne Profits—Improvements under Mistake of Title—Reference—Costs.

Action to recover possession of land and for mesne profits.

A. H. Clarke, K.C., for plaintiff.

Taylor McVeity, Ottawa, for defendant.

RIDDELL, J.:—Mary Bullen was the owner of a certain lot No. 7 on the south side of Gloucester street in the city of Ottawa, and in September, 1868, she was living upon this lot with her son, William Bullen, and the present plaintiff, his wife. At that time they had one child living. Mary Bullen made her last will and testament in that month, of which the material parts are as follows:—

"I give and devise town lot No. 7 on the south side of Gloucester street, in the said city of Ottawa. . . together with all the improvements thereon and appurtenances thereof to the use of my son William Bullen for and during his life. . . and from and after the death of my said son William Bullen, I give and devise the said lot. . . to the use of the children of the said William Bullen lawfully begotten or to be begotten, and the heirs of the bodies of the said children of the said William Bullen respectively, and in default of issue of the said William Bullen lawfully begotten or to be begotten"—a devise over.

Mary Bullen died 12th September, 1868, the will having been made on 7th September. William Bullen continued to live upon the said lot until 9th March, 1878, when he removed to Toronto. In the meantime he seems to have made a mortgage of his life interest to one McGillivray. McGillivray, at all events, after the removal of Bullen, leased the premises from time to time, and finally about

23 years ago sold to defendant for \$700. Defendant had already been in possession of the property as tenant of McGillivray, and after the sale she continued in possession, now claiming as owner, and so continues to the present time. She paid \$600 of the purchase money, and, McGillivray dying, she has not been required to pay the remainder.

William Bullen died 21st November, 1906. On 14th February, 1907, four, being all the surviving, children of William Bullen, granted all their interest in the lot to their mother, the plaintiff. It appears that another daughter of the deceased William Bullen predeceased him, leaving issue. These will require to be made parties plaintiffs to this action.

Defendant claims by possession, setting up that the effect of the will is to vest a fee simple in either William Bullen alone or in William Bullen and his children, that is to say, that either the rule in Shelley's case or the rule in Wild's case applies; and counsel, waiving all technical objections to the frame of the action, rests his case upon that proposition.

If the mortgage said to have been given to McGillivray was in reality, as it is asserted, a mortgage by William Bullen of a life interest, it is apparent that defendant was in possession and claiming under a mortgage for the life of William — rightfully in possession — and therefore the time would not begin to run until the death of William as against any one claiming as heir in fee or in tail of William. If, then, I came to the conclusion that William took an estate in fee or in tail, it would become necessary to consider how far the mortgage had been proved. But, in the view I take of the case, such an inquiry is unnecessary.

The will contains an express devise to the son "for and during his life," and then continues "and from and after the death of my said son. . . I give and devise . . . to the use of the children of the said W. B. lawfully begotten or to be begotten, and the heirs of the bodies of the said children of the said W. B. respectively."

No doubt, the rule in Shelley's case has sometimes been applied when the word "children" has been used instead of "heirs" or "heirs of the body," but never, I think, where there is an express life estate devised to the ancestor. And the rule in Wild's case does not apply—the gift to the children not being immediate: *Grant v. Fuller*, 33 S. C. R.

34; Chandler v. Gibson, 2 O. L. R. 442; Re Sharon and Stuart, 12 O. L. R. 605, 8 O. W. R. 625. The two last cases are also authority against the applicability of the rule in Shelley's case. No estate was taken by W. B. except an estate for life—no estate was taken by any of his children except in remainder after this life estate; the statutory period did not begin to run till the death of W. B.; and the defence fails.

Defendant seems to have made certain improvements upon the property under the belief that it was her own; she would, consequently, be entitled to a lien upon the same, to the extent to which the value of the land is enhanced by such improvements: R. S. O. 1897 ch. 119, sec. 30. She is liable for mesne profits. It seems to me that the one may well be set off against the other, and I so direct, unless either party within 20 days . . . elects take a reference, in which case it will be referred to the Master at Ottawa to inquire and report: (1) the amount by which the value of the land is enhanced by lasting improvements thereon made by the defendant under the belief that such land was her own; and (2) the amount of mesne profits to which defendant is liable.

As to costs, defendant was notified of the claim of plaintiff, and held in defiance thereof. She should pay the costs up to and including judgment. If a reference is taken, it will, of course, be at the peril of the party electing to take it. Costs of the reference and all further costs and further directions I reserve to be disposed of by myself . . .

MABEE, J.

JUNE 5TH, 1907.

TRIAL.

FALLIS v. WILSON.

Fraudulent Conveyance—Ante-Nuptial Marriage Settlement—Action by Execution Creditor to Set aside—Fraudulent Intent of Settlor—Knowledge of Intended Wife of Claim of Execution Creditor—Bona Fides—Absence of Knowledge of Fraudulent Purpose—Marriage a Valuable Consideration.

Action to set aside a marriage settlement made by defendant George H. Wilson upon his wife, defendant Alice Emily Wilson, as being fraudulent against plaintiff.

B. N. Davis, for plaintiff.

J. M. Godfrey, for defendants.

MABEE, J.:— . . . The plaintiff, Lizzie Fallis, on 31st October, 1906, obtained a verdict against defendant George H. Wilson for \$1,000 damages for breach of promise of marriage. A notice of motion by way of appeal to a Divisional Court was given, but by consent on 25th January, 1907, the motion was dismissed. Judgment was signed on 26th January, and the costs taxed at \$238.30 on 4th February, and on 6th February execution placed in the sheriff's hands against the goods and lands of the debtor.

During the first week in October, 1906, defendant George H. Wilson proposed marriage to defendant Alice Emily Wilson, then Alice Emily Caton. She took time to consider, and on 16th January, 1907, wrote him the following letter: "68 Elliott St. Dear George: On account of the trouble you are in, I have considered your proposal of October, 1906, on certain conditions, that you settle on me for my own benefit and the benefit of my offspring, if any, \$2,500 either in money or property to that value. I do wish it was spring. I am sure you must feel dreadfully cold on night duty. I hope your mother will soon be better again. I suppose your brother and his wife are still here. I am sure they will be enjoying their visit, although their home out there must be so nice. . . . By-by for the present. With love, Alice."

She had not seen him between the date of the proposal and the date of the letter. On 25th January George H. Wilson called at Miss Caton's house, at about tea time, and asked her when she would get married; she said she was ready at any time, nothing being said about the property or marriage settlement. On 28th January he wrote her a note to meet him the next morning at Mr. Phelan's office (this was burned at the time); she went there as requested and met George H. Wilson, his brother David Wilson, and Lavinia, David's wife; a marriage settlement was prepared, drawn up by Mr. Phelan upon instructions from George H. Wilson, given on the 28th, David and Lavinia Wilson being the trustees; it was read over by Miss Caton, and from it she saw that a 50-acre farm and \$1,000 in money were being settled upon her; the document was executed; the \$1,000 paid over to the trustees; and the marriage was properly solemnized the same afternoon. Miss Caton had no one

acting for her, and was entirely trusting to George H. Wilson making the settlement. The date of the proposed marriage was not fixed until after the execution of the document, but the parties went direct from the law office and obtained the license, and from there to the clergyman. Miss Caton knew that the action for breach of promise was pending against Wilson; he told her of it when he proposed marriage to her, and she saw afterwards in a newspaper that a verdict for \$1,000 had been recovered, and I think a fair inference to be drawn from the letter of 16th January, by its reference to the trouble Wilson was in, is that she then knew the verdict was still unpaid. Whether she knew of the then pending appeal there is no evidence. Defendant George H. Wilson's property consisted of some \$1,200 in cash and the equity of redemption in 50 acres in the township of Vaughan, worth about \$800. So the value of the property settled was about \$1,800, instead of \$2,500. Miss Caton had no knowledge of what the value of the property was, nor as to whether the settlement covered all the property Wilson had. She had not met the trustees before the day the marriage settlement was executed; they are the persons referred to in her letter of 16th January.

It was not contended at the trial that Wilson's object in making the settlement was not to place the property beyond the reach of plaintiff's judgment and execution. The question for consideration is whether the settlement so operates. In determining this, regard must be had to whether the marriage settlement was the consideration that induced Miss Caton to enter into the contract of marriage. She stated both in her examination for discovery and at the trial that she would not have entered into the marriage had the settlement not been made, and I know of no reason why her statement as to this should not be accepted; she was not cross-examined upon it; and I am unable to find the contrary to be the fact.

It was argued that she would have willingly married Wilson without the settlement being made; that she was giving up no prospects at her mother's house; and the proper inference was that the settlement was not the consideration. She had a comfortable home; her delay in accepting the proposal, the knowledge of the actual execution of the settlement in accordance with the request in the letter, that its preparation had been attended to in the office of

reputable solicitors, all goes to strengthen her statement that without the settlement she would not have entered into the marriage. Mrs. Wilson (Miss Caton) appeared in the witness box as a respectable lady; she said she was 35; her husband appears to be some years older; they had been on friendly terms for several years; and there was nothing to shew that she was lending herself to any fraudulent scheme to defeat plaintiff's execution. . . .

[Thompson v. Gore, 12 O. R. 651, distinguished.]

An honest marriage has been entered into by the principal defendant here, who of course is the wife; the marriage settlement has the effect, if it stands, of defeating plaintiff in recovering upon her judgment; if it is set aside, then the wife has been deprived of the consideration moving to her as the inducement for entering into the marriage. Of course, if the wife lent herself to her husband's fraudulent scheme, or entered into the contract for the purpose of defrauding plaintiff, there is no doubt about what the result should be; but I am unable to find such to be the case.

Marriage has always been regarded as the highest consideration, but plenty of cases may be found where such consideration has been of no avail, where found to have been a mere pretence, or, although solemnly entered into, been intended as the cloak for fraud: see *Colombine v. Penhall*, 1 Sm. & Giff. 228; *Fraser v. Thompson*, 1 Giff. 65; *Bulmer v. Hunter*, L. R. 8 Eq. 46.

Although the marriage was honestly entered into on the part of the wife, and the settlement formed the consideration, or at least part of the consideration, for it, is she to be deprived of it because she knew of the indebtedness to plaintiff, and, according to the letter of 16th January, that the trouble was still existing?

In my view, this does not necessarily deprive her of the benefit of the settlement. It might be, and doubtless is, some evidence of fraud, and without more might be regarded as cogent proof of the intention to join in the fraud of the husband. . . .

[Reference to May, 2nd ed., p. 79.]

The 6th section of the Statute of Elizabeth expressly provides that it shall not extend to any estate upon good consideration and bona fide conveyed to any person not having at the time of the conveyance any manner of notice or knowledge of covin, fraud, or collusion. Assuming only

knowledge in the wife of the existence of the judgment and its non-payment on 16th January, does that necessarily make her a party to the fraud? It of course creates a suspicion, and necessarily causes the closest scrutiny to be made into all the surrounding facts. These I have most carefully considered, and the only evidence pointing to any complicity of the wife consists of her knowledge of this debt, and the inference to be drawn from the letter. . . .

[Reference to May, 2nd ed., p. 332; *Fraser v. Thompson*, 1 Giff. 49, 4 DeG. & J. 659; *Hickerson v. Parrington*, 18 A. R. 635; *Re Johnson*, *Goeden v. Gillam*, 20 Ch. D. 389.]

The Court must find that Miss Caton contracted this marriage, not only with notice of the unpaid claim of plaintiff, but also with the knowledge that Wilson was marrying her merely to defraud his creditors. It is reasonable to suppose a woman would contract marriage in such circumstances? I do not think so, nor do I think she contracted the marriage with the view of defrauding the creditors. I think she desired to marry Wilson; she knew of the outstanding claim; she had no knowledge of the extent or value of Wilson's property, and took the precaution of requiring a settlement to the extent of \$2,500 to be made upon her; and it is not shewn that she took this step upon any suggestion of Wilson or with the knowledge that he desired her to take that position. She stands then as a bona fide purchaser for value without notice of any fraudulent intent in the settlor, and herself free from fraud. In these circumstances, the cases shew that she is entitled to more consideration than the creditors.

I think also, notwithstanding scattered statements to the contrary, that the old doctrine that marriage is the highest consideration known to the law should still be adhered to, and that it should continue to be the policy of the law to hesitate long before undoing contracts founded upon that consideration, in the absence of clear and convincing evidence of fraud participated in by the party seeking to uphold the transaction. . . .

[*Bulmer v. Hunter*, L. R. S. Eq. 46. and *Thompson v. Gore*, 12 O. R. 651, distinguished.]

Objection was taken to the form of the marriage settlement, and it was argued that the property was still under

the control of the husband. I do not think so. The deed gives the wife and trustees entire control of the money and lands, and she acquires valuable rights that, without her consent, her husband can in no way interfere with.

I have not overlooked the various facts referred to by plaintiff's counsel upon the argument that in his view pointed to fraud. He contended that the letter of the 16th January was not written at that time, but was ante-dated, written after the marriage, to shew a demand made prior to the execution of the settlement. There is no evidence of this, and it seems to me that the reference in the letter to the trouble Wilson was in is strong evidence of the letter being genuine, both as to origin and date. Without the letter and the admissions of the wife, plaintiff would have been unable to shew that the wife had any knowledge of the existence of plaintiff's judgment. Complaint was made about the business-like manner of the proposal of marriage, and the delay from October to January before the conditional acceptance. The latter was accounted for by illness in the lady's family, and the death of her father. The engagement and marriage certainly were of a rather formal character, but the fire of youth was absent, and the romantic days of each had passed. I listened to the case and approached its consideration with suspicion. I have gone over most of the transactions several times, and, in the words of Mr. Justice Osler in *Hickerson v. Parrington*, ante), "on the whole I have arrived at a firm opinion that the existence of a valuable consideration dominates every circumstance which might be regarded as suspicious."

The action will be dismissed with costs."

It may be proper to say that I have no regrets at having been able to reach the foregoing conclusions, for the following reasons. On 25th January the solicitor for defendant George H. Wilson offered the solicitor for plaintiff \$900 and all costs in settlement of plaintiff's claim, which offer was refused. Since I heard the case and before giving judgment the plaintiff called me by telephone and endeavoured to discuss her case and force her views upon me, and this morning I have received the anonymous letter, written in the interest of plaintiff, which I have attached to the record.

JUNE 5TH, 1906.

DIVISIONAL COURT.

MAYCOCK v. WABASH R. R. CO. AND GRAND
TRUNK R. W. CO.

*Railway—Collision—Death of Engine-driver — Negligence —
Rules of Company—Disobedience of Deceased—Cause of
Death—Action by Widow—Findings of Jury.*

Appeal by plaintiff from judgment of MABEE, J., 9 O.
W. R. 546.

J. H. Rodd, Windsor, for plaintiff.

H. E. Rose, for defendants the Wabash Railroad Co.

W. E. Foster, Montreal, for defendants the Grand Trunk
Railway Co.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.),
dismissed the appeal with costs.

JUNE 5TH, 1907.

DIVISIONAL COURT.

HOWARD STOVE MANUFACTURING CO. v.
DINGMAN.

*Sale of Goods — Proposed Organization of Joint Stock
Company—Liability of Promoters for Price of Goods Pur-
chased for Proposed Company — Partnership — Agency
— Agreement — Novation — Evidence — Joint Liability
—Contribution—Parties—Costs.*

Appeals by defendants Dingman and Coulter, re-
spectively, from judgment of MABEE, J., in favour of plain-
tiffs, an incorporated company doing business in Savannah,
Missouri, for the recovery of \$611.57, the full amount
claimed in an action for the price of certain stoves, against
both defendants, who were described as promoters.

S. H. Bradford, for defendant Dingman.

J. L. Ross, for defendant Coulter.

G. M. Clark and J. A. McEvoy, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., CLUTE, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—By reason of a somewhat unusual course taken at the trial, it becomes necessary to distinguish between the facts as proved against defendants, respectively. As between plaintiffs and defendant Dingman the following appear to be proved. Lincoln Howard, of Savannah, Mo., was the inventor of certain improvements to stoves, which he patented. The plaintiffs, a company of Savannah, manufactured stoves, according to this patent, but had no interest in the Canadian patent. In September, 1902, one Williams, an attorney and agent for Howard, met Dingman in Toronto, and an agreement was made between Howard and Dingman whereby Dingman had an option of dealing with the patent rights for Canada in any one of the 3 specified ways, one of these being the formation of a joint stock company, the transfer to such company of the Canadian patent, and the payment for such patent in stock of the company. On 5th October, 1902, Dingman writes to Williams, who was also an officer of plaintiffs, in reference to the option, and adds: "What I wish to learn at once is, will the Novelty people furnish us with the castings and sheet steel bodies for 100 stoves and at the cost price as given in the estimates furnished? . . . (2) Will Mr. Howard waive royalty . . . ?" It is important to observe that thus soon Dingman was quite aware that plaintiffs—the Novelty people, as he calls them—and Howard were not at all the same, but must be dealt with separately.

On 2nd November, 1902, the defendants Dingman and Coulter entered into an agreement. . . .

About a fortnight after this, Dingman went to Savannah, saw Howard (who was also the president of the plaintiffs), and made with Howard an agreement selecting that one of the three options mentioned above, contracting that he would organize a company, and that a certain amount of the stock of the company would be delivered to Howard for the patent rights for Canada.

At the same time he bought from the plaintiffs the stoves, the price of which is in question in this action, for the purpose of putting them up right away while the company was organizing and getting ready for manufacturing,

and this with the formation of the company in view. Some of these he directed to be sent to the address of Coulter and some to his own address. Whether he at that time told the officers of the plaintiffs that he was acting for Coulter is disputed, and is not material to the present inquiry.

In December Coulter had found that he could not go on with the promotion of the company, and so Dingman informed the plaintiffs. Coulter refused to take the goods from the station, and finally it was arranged that, as the goods had been shipped to Coulter, and his concurrence was necessary to get the goods, the shipment should be delivered to Coulter, "and by accepting same, we (the plaintiffs) understand that he assumes no obligation for the payment."

Considerable negotiations were carried on by Dingman as to the disposal of the stoves, and in the long run plaintiffs demanded payment. Upon his attempting to connect the transactions with the plaintiffs and those with Howard, he was reminded that Howard and the plaintiffs were quite distinct. I do not think this reminder was necessary, as it is quite clear that, whenever he thought about the matter at all, he quite appreciated this fact.

It is said that there was a novation, a new contract, express or implied, as to the payment for or disposition of these goods, but neither oral nor written evidence shews anything of the kind.

I think that the appeal of Dingman should be dismissed, and with costs.

The position of Coulter is different. At the trial, by arrangement between counsel for the plaintiffs and for Dingman, Dingman's evidence for discovery was read as evidence for Dingman. This was against the objections of counsel for Coulter; and of course it cannot be read against Coulter.

What is proved against him is the agreement between him and Dingman, and the fact that certain stoves were shipped to his address. All the letters and oral statements of Dingman must be excluded, unless they become admissible from the relationship created by the agreement of 2nd November, 1902. The terms of this become material. It will be seen that the agreement provides that their interests shall be equal in the agreement which Dingman had, giving him the right to negotiate a sale of the patent and to organize a company to manufacture the heaters, and that

their interests shall be equal in the promotion and organizing of such company. No doubt, the association of the two was simply to promote and organize the company, and it is therefore argued for Coulter that his position of joint promoter with Dingman does not render Dingman his agent to buy goods. If this contention be sound, the appeal of Coulter should be allowed. But is that the state of the law?

The rules as to the liability of promoters for the acts of each other are accurately laid down in *Lindley on Companies*, 6th ed., p. 193 . . . ; see also *Sandusky Coal Co. v. Walker*, 27 O. R. 677, 681, 687; and were Dingman and Coulter simply subscribers for stock and promoters, only in that way, or in the ways mentioned in the cases in *Lindley* at pp. 193, 194, and 195, there could be no pretence but that Coulter was liable. But they are much more intimately connected than that. They have agreed to "become associated" (to use the language of the contract), and are engaged in a commercial enterprise, viz., that of operating a company and with an agreement that they shall share the profits derived from it. Such an association is a partnership, unless the contrary is shewn: *Pooley v. Driver*, 5 Ch. D. 458; *Adam v. Newbigging*, 13 App. Cas. 308, 316; *In re Foot*, [1897] 2 Q. B. 495.

I do not think there is anything in the circumstances of this case leading to a contrary conclusion. Dingman was then the agent—or partner—of Coulter in making the purchase of the stoves.

Moreover, the contract itself shews that before the organization of the company Dingman was to have control of the "advertising department." This can only mean that in the pursuit of the common undertaking, and until the organization of the company, Dingman was to use his judgment as to what was proper for the purpose of advertising the company and its intended manufacture; and it is clear that Dingman bona fide thought that the best way of advertising was to have these stoves sent on and exposed to the public. I think Coulter was liable for the amount sued for. The fact that he refused to take the goods from the railway station without any assurance that this act should not render him personally liable does not affect his liability. The only assurance that he received—even if it be considered that the letter of 23rd March, 1903, was within the authority of the writer—was that that act should not

render him personally liable. I have considered his case, therefore, without regard to that circumstance.

Coulter being thus originally liable, no new contract has been shewn; and his appeal should be dismissed.

The evidence which fixes him with liability was produced for the first time upon the argument of the appeal. Plaintiffs then should have no costs of the appeal, and, as Coulter is liable for the amount found by the trial Judge, he should have no costs of the appeal.

Complaint was made that the trial Judge should have added Howard as a party defendant. This is admittedly a matter of discretion, and we do not interfere with that discretion. The refusal to add Howard as a party will be without prejudice to any action which either defendant may be advised to bring against Howard. And, of course, the judgment will not interfere with any action or other proceeding by either defendant against the other for contribution. . . .

JUNE 5TH, 1907.

C.A.

EMBREE v. McCURDY.

Receiver—Motion for, after Judgment, when Appeal Pending—Jurisdiction of Court of Appeal—Partnership—Dissolution—Receiver not Asked for in Statement of Claim or at Trial—Grounds for Motion—Danger of Loss of Partnership Assets—Costs.

Motion by plaintiff for an injunction or receiver, in the circumstances mentioned in the judgment.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A. .

B. K. Davis, for plaintiff.

F. E. Hodgins, K.C., for defendant.

MOSS, C.J.O.:—The action is for a declaration that a partnership existed between the plaintiff and defendant in

the business of contractors, etc., and for dissolution and the taking of the accounts and winding-up of the partnership affairs. The defendant denied the existence of a partnership. There have been two trials, each resulting in a judgment in favour of plaintiff. The last judgment declares that there was a partnership between the plaintiff and defendant, orders that it be dissolved on the day of the judgment, and directs a reference to take the partnership accounts.

The defendant obtained special leave to appeal directly to this Court, and has given security for the costs of the appeal in accordance with Rule 826, but the case is not yet in a position to be brought on for argument. The plaintiff applied to the Judge of the High Court for an injunction to prevent the defendant from dealing with the partnership moneys, pending the appeal, or for a receiver. The defendant objected that the effect of giving the security in appeal was to stay all proceedings in the action, unless otherwise ordered by the Court of Appeal or a Judge thereof—Rules 827 and 829—and therefore there was no power in the Judge to make the order. The Judge directed the motion to stand for 10 days to enable the plaintiff to make an application to this Court. The plaintiff now moves for an injunction or receiver or for such other order as may be just.

This relief was not asked for in the statement of claim or at the trial, though, in view of the issues and the findings in favour of plaintiff, it would seem that the appointment of a receiver, if asked for, would have been granted without any difficulty.

The fact of partnership being denied, the Court would not have appointed an interim receiver pending the determination of the question of partnership or no partnership, unless under very special circumstances: *Peacock v. Peacock*, 16 Ves. 49; *Fairburn v. Pearson*, 2 Macn. & G. 144; *Chapman v. Beach*, 1 J. & W. 594.

But, it having been found that a partnership did exist, and a dissolution having been ordered, the appointment of a receiver would follow almost as a matter of course: *Lindley on Partnership*, 6th ed., p. 534. In *Pini v. Boncoroni*, [1892] 1 Ch. 633, *Stirling, J.*, said: "The plaintiff, however, insists that he is entitled as of right to the appointment of a receiver, and contends that the mere fact of the dissolution gives him that right. That is putting it rather

higher than it is put in Lindley on Partnership, where it is said, and I adopt the statement, that where one partner seeks to have a receiver appointed against his co-partners, if the partnership is already dissolved, as it has been, the Court usually appoints a receiver almost as a matter of course."

At the trial of the present case everything concurred to entitle the plaintiff to a receiver almost as a matter of course, if it had been asked for when judgment was pronounced, for the fact that it was not claimed by the writ or pleading was not an insuperable obstacle: *Norton v. Gover*, W. N. 1877, p. 206.

But the defendant now takes the position that, as the case now stands, there is no jurisdiction or power in this Court to make an order such as is sought for. It would be a singular state of things if it should be found that nowhere is there jurisdiction in a case situate as this is to prevent an appellant pending an appeal from actually making away with the property in question, or from acting or dealing with it in a manner which manifestly must result in loss or in jeopardizing its safety, so that at the conclusion of the appeal the respondent, if successful, is left with a barren victory.

Under the Ontario Judicature Act the Court of Appeal possesses as full powers and jurisdiction as a Court of Appeal as the English Judicature Act, 1873, vested in the Court of Appeal in England. Each is a Court of Appeal only, but, as said by Lord Justice James in *Flower v. Lloyd*, 6 Ch. D. 297, at p. 301, "a Court of Appeal only with incidental original jurisdiction for the purpose of exercising that appellate jurisdiction." Section 54 of the O. J. A. provides, amongst other things, that "a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit, but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof." And it seems reasonable to conclude that what may be done by a single Judge during vacation can be done by the Court at any other time. In *Johnstone v. Royal Courts of Justice Chambers Co.*, W. N. 1883, p. 5, Sir George Jessel, M.R., expressed the opinion that under the corresponding section (52) of the English Judicature Act, 1873.

an application could have been made in the vacation to a Judge of the Court of Appeal to prevent the appellant from being prejudiced by the proceeding by the respondent company with the erection of a building pending the appeal. Sections 57 (12) and 58 (9) confer large powers on the Courts, and sec. 55 provides that "for all the purposes of and incidental to the appeal . . . and for the purposes of every other authority given to the Court of Appeal by this Act the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court."

Having regard to these and other provisions of the Act, it does not seem to be putting any undue strain upon these powers, authorities, and jurisdiction, to hold that they enable the Court of Appeal to make an order such as is asked for on this application if a proper case is shewn: *Salt v. Cooper*, 16 Ch. D. 544.

For the time being a case in the position of this case is withdrawn from the High Court pending the appeal and until judgment has been given therein: *Hargrave v. Royal Templars of Temperance*, 2 O. L. R. 126. All proceedings in the High Court, except the issue of the judgment and the taxation of the costs thereunder, are stayed: Rule 829. But the stay is subject to the provisions of the Judicature Act and the Rules, by which the Court of Appeal is enabled to prevent prejudice to the claims of the parties pending the appeal. These powers should, no doubt, be exercised sparingly and with caution, having regard to the rights of all parties and the interests of justice, but they ought not to be withheld in a proper case.

For the purposes of this application it must be taken as established that the defendant has in his hands partnership funds to a considerable amount. They appear to be mixed with and to form part of an account which the defendant keeps at a bank in his own name, and which he uses for the purposes of his business. They are exposed to all the risks attendant upon such a mode of dealing with them. This state of affairs, of itself, furnishes strong reason for the appointment of a receiver: *Harding v. Glover*, 18 Ves. 281; *Doupe v. Stewart*, 13 Gr. 637. The defendant does not shew himself to be possessed of property and means beyond what he has embarked in business. He makes a general statement as to his ability to meet all claims against

him. On the other hand, it is shewn that since the judgment was pronounced he has conveyed a parcel of land to his wife. The explanation offered is the somewhat familiar one of a purchase of the property with the wife's money, but the conveyance made to the husband. Whatever may be the fact, the circumstance affords some additional ground for the plaintiff's application.

An order should go for the appointment of a receiver in the usual way, with liberty to the defendant to propose himself, giving security, or, if the defendant now consents, an order will go appointing him on his giving security to the satisfaction of the registrar if the parties cannot agree. If the defendant does not consent to become receiver, or if the parties disagree as to the appointment, the reference will be to the registrar.

As to the costs, the plaintiff, by his neglect to ask for or obtain a receiver at the trial, rendered this motion necessary, and the costs should be costs to the defendant in any event of the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented.

JUNE 5TH, 1907.

C.A.

CARMAN v. WIGHTMAN.

Mortgage—Assignment—Agreement—Executors of Purchaser from Mortgagor—Liability for Mortgage Moneys—Statute of Limitations—Indemnity—Cause of Action—Payments on Mortgage.

Appeal by defendants W. J. McNaughton and Margaret Wightman, executors of John Wightman, from judgment of MACMAHON, J., 8 O. W. R. 572, holding the testator's estate liable to pay to plaintiff \$2,288.20 with costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

C. H. Cline, Cornwall, for appellants.

R. Smith, Cornwall, for plaintiff and defendants by counterclaim.

Moss, C.J.O.:— . . . The evidence establishes that in January, 1898, the executors of Patrick Purcell, the mortgagee, were taking proceedings to enforce payment of the mortgage money either by sale under the power or by action. There were at the same time moneys and securities belonging to the testator's estate, in the hands of Leitch & Pringle, applicable under the testator's will to the payment of the mortgage, but they were not immediately available for that purpose, or at least not to an extent sufficient to pay the amount of principal and interest demanded. Out of moneys in Leitch & Pringle's hands belonging to the estate the sum of \$419.45 was paid to Purcell's executors on account of arrears of interest, leaving \$200 arrears of interest and \$2,000 principal money still payable. This amount was lent by plaintiff to the executors of Wightman, the defendants who now appeal, it being arranged that the mortgage should be assigned to plaintiff, and that the \$2,200 should be repaid to him by defendants, one-half on 15th January, 1899, and the other half on 15th January, 1900.

There is no doubt that the money was advanced to defendants in order to enable them to put an end to the proceedings which had been taken against the mortgaged premises, and it was paid to and received by the executors of Purcell, who executed an assignment of the mortgage to plaintiff, and the proceedings thereunder dropped. Subsequently payments were made on account of interest to plaintiff out of the moneys or proceeds of securities belonging to the testator Wightman's estate in Leitch & Pringle's hands. The defendants now resist payment, and contend that the estate of Wightman is not liable.

The mortgage to Purcell had been made by one McCrimmon, who afterwards sold and conveyed the lands comprised therein to the testator Wightman for \$5,300, subject to the mortgage for \$2,000, which was deducted from the consideration of \$5,300.

The transaction was therefore not a sale to Wightman of the equity of redemption, but a sale of the lands, the amount of the mortgage being treated as part of the price and retained by the purchaser for payment to the mortgagee. In *In re Cozier, Parker v. Glover*, 24 Gr. 537, it was decided by Proudfoot, J., that in such a state of circumstances the mortgagee might maintain an action directly against the purchaser for the amount of the mortgage, and was entitled

after the death of the purchaser to prove against his estate in the hands of his executor for the mortgage moneys. See this case referred to by Hagarty, C.J., in *Canavan v. Meek*, 2 O. R. 636, at pp. 645-6. And there is force in the argument that the purchaser, by agreeing to retain so much of the purchase price as represents the mortgage, renders himself subject to liability to be called on for payment by the mortgagee. In this case the estate of Wightman was directly liable to pay the Purcell mortgage.

But it is not necessary to rest on this ground, for on other grounds the estate was subject to be rendered liable for payment of the mortgage.

It is undeniable that upon becoming the purchaser of the lands from McCrimmon, Wightman rendered himself liable to indemnify his vendor and save him harmless on the covenant for payment therein contained, and it was the executor's duty, as soon as payment of the mortgage money was demanded of them, to pay it off in order that the testator's obligations might be performed. It was suggested that McCrimmon's right to demand indemnity was barred by the Statute of Limitations. The mortgage was made before 1st July, 1894, and the covenants would not be barred under 20 years from the time when the cause of action arose: R. S. O. 1897 ch. 72, sec. 1 (b). There is no proof of any default in payment prior to the date when the principal sum of \$2,000 became due on 27th February, 1894, and in any case there is no proof that before that date there had been any demand on McCrimmon so as to entitle him to call upon the testator to make good his obligation to indemnify. No point of time is shewn at which his cause of action (if any) arose: *Angrove v. Tippitt*, 11 L. T. N. S. 707. Nor were the mortgagee's remedies against McCrimmon upon the covenants lost by reason of any supposed dealings between Purcell's executors and the testator Wightman: *Forster v. Ivey*, 2 O. L. R. 480. The estate being thus liable to pay the amount of the mortgage debt, the executor, not having funds in their hands immediately available, had authority to borrow such an amount as was needed, and, if need be, to pledge the assets of the estate. And one executor, especially if the acting or managing executor, may bind his co-executor. All the executors are not bound to concur in an act in order to render it binding on the estate:

McLeod v. Drummond, 17 Ves. 152; Ewart v. Gordon, 13 Gr. 40.

Again, defendants had in the hands of Leitch & Pringle securities and property of the estate which under their testator's will they were bound to devote to the payment of the Purcell mortgage. When they were called upon to pay, they were unable to apply these assets. They had, as they contend and admit, more than sufficient for the purpose, but they were not available. In order to tide over the difficulty and to save the estate, they obtained a loan which enabled them to accomplish what they desired. They ought not to be allowed now to allege as against plaintiff that it should not be repaid out of the estate which received the benefit of it.

They say they left the payment of the debt to be made by Messrs. Leitch & Pringle out of the moneys in their hands, or to come to their hands out of the securities belonging to their testator's estate, and payments were made by these gentlemen on account out of such moneys, the last being in September, 1904. It must be taken that up to that date they acknowledged the debt as a valid and subsisting liability of the estate.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 5TH, 1907.

C.A.

OTTAWA ELECTRIC R. W. CO. v. CITY OF OTTAWA.

Assessment and Taxes—Street Railway—Exemptions—Land Leased from Crown—Agreement with Municipality—Construction—Storage Battery—Real or Personal Property—Ejusdem Generis Rule—Fixtures—Constitutional Law—Assessment Act—Property of Dominion.

Appeal by plaintiffs from judgment of TEETZEL, J., 7 O. W. R. 481, dismissing the action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

F. H. Chrysler, K.C., for plaintiffs.

T. McVeity, for defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

Moss, C. J. O.:—The real question between the parties is in regard to an assessment imposed by the defendants upon the plaintiffs in respect of an electrical machine of large proportions, technically known as a storage battery. In respect of this storage battery the defendants have assessed the plaintiffs for \$40,000. The plaintiffs contend that they are not liable to the assessment, on the grounds, first, that under an agreement between the plaintiffs and defendants dated 28th June, 1893, and validated by Acts of the Parliament of the Dominion and of the legislature of Ontario, the storage battery is exempt from taxation; and secondly, that, being situate on lands the property of the Dominion, it is, with other property belonging to the plaintiffs situate on the lands, not liable to taxation. In connection with this latter ground a question was raised as to whether the provisions of the Assessment Act, R. S. O. 1897 ch. 225, in so far as they deal with property of Canada, are within the legislative authority of the legislature.

The respective Attorneys-General for Canada and Ontario were notified, and counsel appeared for the province. But the facts of the case do not appear to furnish any occasion for discussion of these questions.

The plaintiffs hold the lands under a lease put in evidence at the trial, the effect of which, as stated by counsel for the plaintiffs, is that they are virtually owners of the property; their title is as good as a title in fee.

The Assessment Act does not profess to render liable to taxation lands or property belonging to Canada. On the contrary, it declares that they shall not be liable. So far, therefore, no constitutional question arises.

It does not appear that the defendants have endeavoured or are now endeavouring to impose taxation on anything that is the land or property of the Crown. If they should seek to do so, there are provisions in the Assessment Act that would render nugatory any such attempt, and suffi-

ently protect the property of the Crown. And we ought not to attribute to the defendants an intention to enlarge their powers beyond those conferred by the Act.

The case, therefore, resolves itself into the question whether the storage battery is exempt under the agreement.

The plaintiffs are operating their cars upon and along the defendants' streets, by means of electricity, under and in accordance with the terms of the agreement. For this purpose it is, of course, essential that electric power should be generated and constantly supplied and distributed throughout the entire system. Regularity and constancy of supply are material factors in the proper and satisfactory working of the motive power applied to the cars.

From the description of the storage battery in question, its chief office seems to be to control and regulate the supply of electric power as it passes from the generating dynamos to the street and rail wires. A secondary purpose is the collection and storage of surplus power capable of being used in case of temporary failure of transmission from the dynamos. It takes no part in the generation of power. It is merely a link in the chain of transmission from the generators to the wires. It is put in use by connecting it with the power by means of a simple contrivance, and in the same way it can be taken out of service, and the power connected directly, so that it is transmitted to the cars without using the storage battery. It can only be spoken of, if at all, as fixed machinery, in the sense that it is stationary, made up of segments which rest of their own weight upon, but not attached to, the floor of the building in which it is situate. This being a general description of its nature and uses, does it come within the property exempt from taxation under the terms of the agreement? The material sections of the agreement are the 18th and 52nd, which are set out at length in the judgment delivered by the trial Judge. The 18th section exempts from taxation the franchises, tracks, and rolling stock and other personal property used in and about the working of the railway. There is no context to exclude the more comprehensive meaning given to the expression "tracks" by the 52nd section. Therefore, the word "tracks" as used in the 18th section is to be read as meaning the rails, ties, wires, and other works of the company used in connection therewith.

The trial Judge was of the opinion that the storage

battery did not come within these expressions, but was to be treated as real estate. This conclusion was reached by the application of the law of fixtures and by treating the battery as constructively annexed to the realty. But the question is whether, in the circumstances, the law of fixtures has any application.

As already stated, the battery is not part of the machinery engaged in producing the power. It is part of the apparatus used for applying the generated power to the working of the railway.

No doubt, the plaintiffs' witness Murphy assented more than once to the suggestion of the defendants' counsel that it formed part of the power plant, but it is quite apparent from his testimony that he did not intend to give to it the character or quality of a producer, and all that he meant to convey was that it was a medium in the transmission of power in its application to the working of the railway. There can be no manner of doubt that before it was brought to the premises, power was being conveyed to the railway, and that it was put in as an addition to the apparatus previously in use. When it was brought here, it was undoubtedly personal property. And beyond question it was brought there and placed where it is for the purpose of being used in connection with the working of the railway. There is nothing in the nature of the use to which it was put to necessarily change its original character. What reason then is there for removing it from the category of personal property? There is nothing in the evidence to lead to the conclusion that it was within the contemplation of the defendants that its employment for the purpose to which it is put would change its character.

It cannot be that the application of a wire to a slot and the turn of a thumb screw converts this collection of boxes or "cells" and plates, which, standing by itself, is a personal chattel, into something else when a reverse turn of the same screw immediately restores it to its former condition. This is not the case of vendor and vendee or mortgagor and mortgagee, or even landlord and tenant, and in any of which questions under the law of fixtures might possibly arise. It is not to be tested by the application of rules applicable to such cases. When the agreement was entered into, and when the assessment now in question was imposed, personal property was liable to taxation equally with real property,

and except that the agreement provided for the exemption from taxation of certain kinds of property specified therein, it could make no difference to the defendants for the purposes of assessment whether the battery was personal property or real property. The practical question was, not so much whether it was real property or whether it was personal property, as whether it came within the words "other personal property used in and about the working of the railway."

It is personal property of which it may fairly be predicted that it is used in and about the working of the railway. It is argued, however, that the general words "other personal property used in and about the working of the railway" are made to follow particular and specific words, and, therefore, must be confined to things of the same kind, by the application of the well known ejusdem generis doctrine. Of that doctrine, Rigby, L.J., remarked in *Smelting Co. of Australia v. Commissioners of Inland Revenue*, [1897] 1 Q. B. at p. 180, "The rule of construction which is called the ejusdem generis doctrine, or sometimes the doctrine '*noscitur a sociis*,' is one which I think ought to be applied with great caution, because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the legislature." These remarks were made with reference to the words of a statute, but they apply with equal force to the words of an instrument. To apply the doctrine in every case where there is a collocation of words apparently used with the intention of covering matters or things that might otherwise be thought to be omitted, would frequently result in frustrating what was actually intended. Given their natural meaning, the words include the storage battery. Is there anything in the earlier words to exclude it? They must all be read in relation to the subject matter with which clause 18 of the agreement is dealing, viz., the exemption of property used in and about the working of the railway. There is no good reason why the concluding words "used in and about the working of the railway" should not apply to and govern all that goes before—the word "franchises" as well as the other words which follow. The franchises here meant are evidently those derived from the defendants in the form of liberty to use the streets for the working of the railway thereon, and such franchises are as

much a genus for the concluding words as tracks (as interpreted by sec. 52) and rolling stock. They are all words to be interpreted in a large and liberal sense as relating to the greater agencies for working the railway rather than trifling articles.

In comparison, however, with the things enumerated, the storage battery is of comparatively slight importance in the working of the railway.

The result is that it should be exempt from taxation, and the judgment should so declare.

The appeal is allowed to that extent with costs here and below, except any costs, if there be any, incurred by reason of the other issues.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 5TH, 1907.

C.A.

BOHAN v. GALBRAITH.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Correspondence—Offer—Quasi-acceptance—Agent.

Appeal by plaintiff from order of a Divisional Court, 9 O. W. R. 95, 13 O. L. R. 301, reversing judgment of TEETZEL, J., in a purchaser's action for specific performance, and dismissing the action without costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A., RIDDELL, J.

J. A. Paterson, K.C., for plaintiff.

W. E. Middleton, for defendant.

OSLER, J.A.:—The facts are peculiar, and the decided cases do not afford us much assistance, but I think that the judgment must be affirmed, for the reason I will state.

If we had nothing but defendant's letter of 15th December, 1905, and the letter from plaintiff's agents of 20th

December in reply, it might perhaps be said that a completed contract between the parties was thereby constituted, unlikely as it may seem that defendant intended his letter as an offer to sell, and thereby to expose himself to the difficulties in which a vendor sometimes finds himself who enters into an open contract. But defendant's subsequent conduct in requiring an offer to be made by plaintiff, in the form and in the terms sent forward by the latter's agents, shews that he did not consider his letter of 15th December as anything but the quotation of a price, and, though it is possible that this might have been of no avail to him if plaintiff had refused to make the offer and had rested upon his letter of 20th December as an acceptance of an offer made by plaintiff, yet, when the latter acceded to his opponent's position and signed and transmitted an offer in the terms required, he cannot, in my opinion, now be heard to say that this offer went for nothing, and that a contract already existed notwithstanding it. I think it is true to say that he thereby yielded to defendant's view that the offer was to come from himself and upon the terms defendant required, and that this offer not having been accepted by defendant, the earlier correspondence cannot be resorted to, and that therefore no contract ever arose between the parties.

The appeal must be dismissed with costs.

MEREDITH, J.A., and RIDDELL, J., each gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., concurred.

JUNE 5TH, 1907.

C.A.

EMPEY v. FICK.

Parent and Child—Conveyance of Farm by Father to Daughters—Agreement for Maintenance—Action to Set aside Transaction—Understanding and Capacity of Grantor—Lack of Independent Advice—Absence of Undue Influence—Parties to Action—Status of Heir-at-law of Grantor as Plaintiff.

Appeal by plaintiff from order of a Divisional Court, 13 O. L. R. 178, 9 O. W. R. 73, reversing judgment of

CLUTE, J., and dismissing the action, which was brought by a son of David Empey, deceased, to set aside a conveyance made by the deceased in 1901 to defendants, two of his daughters, of a farm of 100 acres in the county of Oxford, in consideration of an agreement by defendants for the maintenance of the grantor and his wife and the payment of \$200 to another daughter, and in consideration of past services.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, J.J.A., RIDDELL, J.

J. M. McEvoy, London, and J. S. MacKay, Woodstock, for plaintiff.

W. M. Douglas, K.C., and W. C. Brown, Tilsonburg, for defendants, supported the order for the reasons upon which it was based, and also contended that the action was not maintainable by the plaintiff alone, and that the proper parties were not before the Court.

MOSS, C.J.O.:—As I am of the opinion that upon the facts of this case the appeal should be dismissed, I do not consider it necessary to enter upon or deal with the question of the constitution of the action nor as to parties. The point was not alluded to in the judgments of the Courts below, nor taken in the reasons against the appeal.

On the other grounds I concur in the conclusion that the appeal fails and must be dismissed with costs.

OSLER, J.A.:—The judgment of the Divisional Court deals with the case both on the facts and on the law to be applied to them in a manner which is, to my mind, entirely satisfactory. I can add nothing beyond a reference to *Armstrong v. Armstrong*, 14 Gr. 528, which supports the transaction complained of. I think that the appeal should be dismissed with costs.

MEREDITH, J.A.:—If the transaction in question had been attacked by David Empey in his lifetime, I can have no manner of doubt that it ought to have been, and would have been, set aside. . . . But it was not attacked by the grantor, or by his wife, in his lifetime; on the contrary, it was throughout treated by them as satisfactory and binding, and is now earnestly supported by the widow. There can be no sort of doubt that had it been attacked in his or her name or in

the names of both of them, the action would have been repudiated, and at their instance would have failed. How then can any one representing or claiming under David Empey succeed in a like action? The mental condition of the grantor cannot be said to have been such that he could not have prevented such an action, or such as to make him wholly unable to ratify or confirm the transaction in any manner.

The agreement was not inofficious, even if looked at as a testamentary disposition; provision is made for the one daughter who may be considered as dependent upon her father's bounty, as ample perhaps as a share of the estate in case of an intestacy would be; whilst the one son who might be considered as so dependent incurred—rightly or wrongly—his parents' displeasure to such an extent that he could have no good reason for expectations in regard to their bounty.

For these latter reasons only, I would dismiss the appeal.

RIDDELL, J., gave elaborate written reasons for dismissing the appeal. He expressed the opinion that the action was not properly constituted, and upon the merits agreed with the judgment below.

GARROW, J.A., also concurred.

JUNE 5TH, 1907.

TRIAL.

CHALK v. WIGLE.

*Master and Servant—Contract to Pay Wages—Adopted Son—
Method of Payment—Quantum Meruit—Period of Services
—Limitation of Actions.*

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of the plaintiff William Chalk, in an action by him and his wife to recover wages. At the trial the action as to the wife was dismissed, and she did not appeal.

The defendant was a farmer. When the plaintiff William Chalk was an infant of the age of 5 years, he came to reside with the defendant, under an agreement of adoption, and continued so to reside until about May, 1904. The plaintiff's claim was for wages after he had attained the age of 21 years, or for a period of about 15 years, but the Statute of Limitations was set up as a defence, with the

result that the claim was confined to a period of 6 years before action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. S. Wigle, Windsor, for defendant.

F. E. Hodgins, K.C., for plaintiff.

GARROW, J.A.:—The Chief Justice held that, under the circumstances, an agreement to pay wages had been established, and with that conclusion I agree. There is no dispute about the rendering of the services, and their nature. They were such as are usually rendered by a farm servant, and of course were valuable to defendant. And there is also practically no dispute upon the evidence that the services were not intended to be gratuitous: see *Murdock v. West*, 24 S. C. R. 303; *McGugan v. Smith*, 21 S. C. R. 263.

The real dispute is as to how they were to be paid for, the defendant's contention being that the plaintiff's position was like that of a son, and that he, the defendant, had promised and intended to recompense the plaintiff by providing for him in his will. But, unfortunately for the defence, the evidence falls short of proving that the plaintiff ever agreed to accept that mode of payment; and the matter was in consequence left open. The plaintiff and the defendant both apparently have violent tempers, and repeatedly quarrelled. And the question of wages or payment seems seldom to have been mentioned, except during an altercation of some kind, with the result that there is nothing in the evidence which can be relied on as proving a specific bargain of any kind, or as fixing by agreement the rate or amount of the wages. The defendant, however, had at one time, in the course of one of these periodical quarrels, offered to give to plaintiff a parcel of land (referred to in the judgment), and plaintiff under examination stated that, had he been offered a clear deed, he would have accepted the land in settlement. And the Chief Justice, taking the value of that land as a basis, arrived at the sum of \$1,000, for which he gave judgment. Counsel for the defendant objected before us to that mode of reaching the result, as well as to the result itself, as being in effect in the nature of compelling a performance by defendant of his offer to convey the land. Reading the whole judgment, the criti-

cism is not, I think, well founded. But in any event it is not decisive, unless the result itself can be successfully attacked. For myself, and with deference, I prefer what seems to me to be a simpler and more direct method.

My view is this: there was no express contract, but the services were to be paid for. In the absence of an express contract, plaintiff is entitled to recover as upon a quantum meruit. But, in view of the defence of the statute, he can only recover for $4\frac{1}{2}$ years' services, which goes back to 6 years next before the commencement of the action. Upon the evidence, a fair wage for the year round would be \$17.50 a month, which for $4\frac{1}{2}$ years would amount to \$945. And from that should be deducted \$40 a year, which plaintiff admitted (the exact admission was \$35 or \$40 a year, which was, I think, an admission of the larger sum) he had been paid, leaving as the balance \$765, for which, in my opinion, he should have judgment.

And with this variation the appeal should be otherwise dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissenting, was of opinion, for reasons stated in writing, that the action should be dismissed.

JUNE 5TH, 1907.

C. A.

WILSON v. LOCKHART.

(AND TEN OTHER ACTIONS.)

Promissory Notes—Procurement of, by False Representations—Conspiracy—Transfer of Notes to Plaintiff for Value—Bona Fides—Absence of Notice—Circumstances of Suspicion—Copy of Promissory Note—Actual Signature of Maker—Destruction of Part of Document Shewing it to be a Copy—Uttering of Copy as Note—Forgery—Defence to Action by Holder for Value—Negligence—Estoppel.

Appeals by plaintiff from judgments of CLUTE, J., dismissing 11 actions brought by Albert J. Wilson against the

first-named defendant in each action, one Eber B. Tree being also a defendant in each action, but judgment having been signed against him. The actions were brought to recover the amounts of promissory notes signed by defendants. They set up that their signatures to the notes were obtained by fraud, of which plaintiff had notice.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, J.J.A.

E. F. B. Johnston, K.C., and Peter McDonald, Woodstock, for plaintiff.

G. T. Blackstock, K.C., and W. T. McMullen, Woodstock, for defendants.

GARROW, J.A.:— . . . The action is upon a promissory note for \$1,000 made by defendant Lockhart in favour of defendant Tree or order, and by the latter indorsed to plaintiff.

There are 10 other actions brought by the plaintiff upon similar promissory notes made by other parties under similar circumstances. All were tried together, the appeals were heard together, and all abide the result in this except the case against Sydney Pearson, in which the facts differ, and which must, therefore, be dealt with separately.

The statement of defence admits the making of the note, the indorsement to plaintiff, and that plaintiff is entitled to recover, but for the facts and circumstances set forth therein as follows.

The various defendants and others had some years ago invested considerable sums of money in the attempted perfecting of a rotary engine invented by defendant Tree, and a company was incorporated under the name of the Tree Rotary Engine Co., which acquired the patents held by defendant Tree. The perfecting of the engine not having been accomplished, and all the money so invested having been spent, a second company, called the Imperial Engine Co. Limited, was incorporated and acquired the patents, one W. O. Taylor being president of this company, and he and defendant Tree being active in the promotion thereof. In the autumn of 1905 Taylor and Tree (as alleged) formed the fraudulent design of inducing the defendants to sign promissory notes for \$1,000 each, payable to Tree or order.

upon the false and fraudulent representation that the notes would be deposited in the Western Bank at Tavistock as collateral to an undertaking or liability of the Imperial Engine Co., to be incurred at the office of the bank for the purpose of raising money to be used for the purpose of the erection of a plant for the manufacture and sale of the engines at the village of Tavistock, which factory Taylor and Tree falsely and fraudulently represented it was the intention of the Imperial Engine Co. to erect, and that defendant would be protected against the note, Taylor and Tree falsely and fraudulently representing that the sum obtained from the bank would be repaid out of funds of the company to be raised by the sale of stock, and that defendant would not be called upon to pay the same, whereas, as the fact is, neither Taylor nor Tree nor the Imperial Engine Co. even intended to erect any such factory, nor did they intend to obtain from the bank any sum of money upon the undertaking or liability of the Imperial Engine Co., as to which the notes were to be deposited as collateral, but, on the contrary, the above representations and engagements made by Taylor and Tree were made without any bona fide intention of carrying out the same, and their object and intention was the falsely, fraudulently, and corruptly inducing defendant to sign the note. Tree, in pursuance of the fraudulent scheme, transferred the note to plaintiff, and plaintiff took it with full knowledge of all the facts and circumstances connected therewith, and with knowledge of the fact that Tree was defrauding defendant, and plaintiff was privy to and aware of the fraudulent scheme, both before and after the making of the note, and defendant was induced to sign by the false and fraudulent representations of Taylor and Tree, and relying thereon to the knowledge of plaintiff. Plaintiff gave no value for the note, and is not the bona fide holder thereof for value without notice, or the holder in due course. (These were the allegations of the defence.)

There is substantial agreement that when the notes were obtained Tree represented that he intended to use them at the agency of the Western Bank at Tavistock as a basis for credit, or, in other words, to raise money to build a factory there, and that he promised to indemnify defendants against the notes, which he said would be taken up out of the proceeds to be derived from the sale of stock in the Im-

perial Engine Co. And also a like agreement that in the case of each note he obtained from the maker a written application for stock in that company for the same amount as the note, the defendants stating that they did not buy the stock, but were told by Tree that he was making them a present of it, and that the signing of the application was mere matter of form. And it is also substantially agreed that in every case there was a subsequent transfer by Tree to defendants of paid up stock till then held and apparently owned by him to satisfy the applications.

There is no direct evidence of any arranged prior scheme between Taylor and Tree to obtain the notes such as is alleged in the pleading. There are even some incidents which, to my mind, suggest that it is possible that Taylor, and even Tree, carried away by the enthusiasm of the inventor, may have made the representations in good faith. But, as these conclusions do not necessarily affect the result so far as plaintiff is concerned, I do not dwell upon them, but will assume that the notes were negotiated in fraud of the agreement upon which defendants made and delivered them to Tree, which is sufficient for defendants' purposes, if—the really difficult point in the case—notice or bad faith is brought home to plaintiff.

The summing up upon this point by the trial Judge is as follows: "The whole circumstances of the case, the large indebtedness to him (plaintiff), the financial condition of Tree and of Taylor, known to him, the fact, as I believe it to be the fact, that he was in touch with Tree, that Tree visited his house, that he knew from Parsons, according to his own admission, that a note which Tree had agreed to take care of and which was obtained on that representation, had not been taken care of, the circumstances all lead my mind to the conclusion, and I entertain no doubt whatever, that at the time that the plaintiff went into this transaction he did not do so bona fide, but that he did it for the express purpose of getting rid of these old claims, and having them cleared out, taking his chances upon the result. I think I am justified in inferring that he knew what Tree was doing, and that Tree was acting in touch with him, and that the meaning of it all was that the plaintiff was to get his share of the transaction by having these old claims paid, and relying upon the fact that he was dealing with promissory notes."

There were two modes of attack open to the defendants, one by proving that the plaintiff was in fact a party or privy to the original fraud, the other that, assuming his original innocence, he nevertheless purchased either with direct notice of the imperfection in Tree's title, or under such circumstances of suspicion, with the means of knowledge in his power which he wilfully disregarded, as would, if pursued, have led him to the truth: see per Lord Blackburn in *Jones v. Gordon*, 2 App. Cas. 616, 629. The judgment of the trial Judge evidently proceeds upon the first rather than the second of these modes, although there are expressions in it applicable to both.

The plaintiff could scarcely be truly described as "in touch with Tree," "knowing what Tree was doing" in his efforts to obtain the notes in question, and "expecting to share in the proceeds" with the object of wiping out the old liabilities, without implying that he was simply an original party to the fraud, and in fact a co-conspirator with Tree and Taylor. This is to impute to him a very gross personal fraud, and should be supported by clear and satisfactory proof.

The evidence need not, of course, be direct, but, if inferential, it must lead the judicial mind inevitably to the conclusion that the transaction is inconsistent with honesty.

And I am, with deference, wholly unable to find such evidence in this case. There is, to begin with, a total absence of direct evidence to connect the plaintiff with the origination of the fraud. That is not disputed. And the disconnected, and upon the whole trivial, circumstances relied on, such as the Clark incident, the cab drivers' stories, Moisey's evidence, and the evidence of Parsons, are wholly insufficient, in my opinion, to justify any such inference.

Upon the other branch there is no evidence that the plaintiff had, when he purchased, actual notice of the original agreement between Tree and the several makers, nor is it seriously denied that he paid in cash the sum of \$5,000, and gave up or credited upon the other securities held by him the balance, less the discount of \$600. His position is, therefore, that of a purchaser for value. Is he also a purchaser in good faith, and without notice? Some statement of the surrounding circumstances seems to be necessary.

The plaintiff is a retired farmer (and an old neighbour of some if not all of the defendants), now residing in Woodstock, where he lends his own money and occasionally buys notes. Tree was the inventor of an engine, in which at one time or another he had contrived to interest many people. Taylor was a reputable physician practising at Princeton, and president of the Imperial Engine Co. The defendant Lockhart has been warden of the county of Oxford, and is evidently a man of intelligence and of considerable business experience. He has been interested in several companies, and knew much more than the ordinary farmer about stocks and their transfer. He had been Tree's teacher in Sunday School, and must therefore have known him for many years. The plaintiff, too, had known Tree for 20 years, and in that time had had many dealings with him. The plaintiff had been a shareholder in the first company but not in the second. He apparently held on 1st December about \$6,000 worth of securities obtained for discounts and advances to Tree and Taylor, and otherwise in connection with the business of the engine. And in addition he also held a note of one Stahbler for \$4,000, which grew out of the same business. And, so far as appears, he held nothing but personal security for these large sums.

On 1st December the engine had not been condemned, and Taylor and Tree apparently then stood as high as ever in the confidence of those interested. They experienced no difficulty or set back in their canvass for the notes in question. That the defendants trusted them is proved by the readiness with which they gave the notes for such considerable sums; that plaintiff had also trusted them is proved by the large amount of unsecured paper which he was then holding, much of which he knew would be worthless unless the engine proved to be successful. Under these circumstances and on that date Tree and Taylor came to the plaintiff with the first lot of notes, amounting to \$5,000, and the negotiations began.

The plaintiff was examined at the trial and gave his version. Taylor was examined by the defendants under commission executed at New York, and his evidence was used at the trial.

There are, of course, as was to be expected, some discrepancies between the two accounts, none, however, of serious

importance, in my opinion. The defendants at least cannot complain if Taylor's story is adopted, for he is their witness.

[Transcript of portions of evidence of Taylor.]

There are of course, as was to be expected, discrepancies between the story as told by the plaintiff and as told by Taylor. The plaintiff said he was not shewn the application, but was merely told they had been selling stock; that they had come to an agreement on the night of 1st December, and that the changing of the applications was not done at his suggestion. What Taylor said as to these matters, I have set out. The discrepancies are of no importance. Probably neither is absolutely accurate, and yet both may be perfectly truthful. Taking all the evidence together, I think it probable that the plaintiff was shewn the applications, and improbable that he pointed out the defect or difference between the applications and the stock with which it was proposed to satisfy them. That, I have no doubt, was pointed out by Mr. McDonald, the solicitor, next day. No doubt the matter was discussed next day in the presence of both the plaintiff and Taylor, and in the result Mr. McDonald, instructed and paid by Tree, suggested and carried out the mode for making the necessary corrections.

But the chief importance, to my mind, of Taylor's evidence is that it so effectually corroborates the main story of the plaintiff, a circumstance which I cannot help thinking was not present to the Judge's mind when stating his conclusion that the plaintiff was not to be believed. For so concluding he gave as the reason the fact that the plaintiff had sworn that he believed the old securities to be good. Some of them probably were, upon the evidence, but certainly not all, nor even the bulk, but after all he was merely expressing his opinion, and that opinion is found, on reading his whole statement, which, of course, should be done, to largely rest upon the final success of the engine.

Why deny to him a little of the faith, and even the unwisdom, so abundantly shewn by the defendants, who, upon request and on Tree's mere verbal promise that all would be well, gave him these very considerable promissory notes?

The plaintiff has not shewn in the transactions with Tree that he is a much keener or wiser man than the defendants. He, too, had trusted him, to a much greater

extent even than the defendants, as witness the large amount of unsecured paper held by him prior to the first of the transactions in question.

And if the plaintiff can be and ought to be accepted as a truthful witness, the defence must fail.

The story he told is not improbable. It is supported by and in line with the documentary evidence, and in addition has, as I have pointed out, Taylor's corroboration.

Taylor's statement only of course extends to the first transaction, although, as the plaintiff has sworn, he was present at all three. He was not asked as to the second and third. But before his examination at New York, he had been seen by the defendants' solicitor, who knew from the plaintiff's examination for discovery what the plaintiff's story was, and had given him a statement. He was apparently not an unwilling witness for the defendants, and it may, I think, under all the circumstances, be now assumed that if he could have substantially contradicted the plaintiff as to the other transactions, he would have been questioned as to them. And Taylor's evidence, if believed, disposes of practically all the circumstances of suspicion so much relied upon by the defendants and to which I have before referred. These circumstances all point to the assumption that the plaintiff was in the fraud practically from the beginning.

But, as Taylor details the interview of 1st December, that assumption is shewn to be false, unless the conspirators were, when no one but themselves was present, busy with keeping up vain and meaningless appearances. If that meeting was the mere culmination of a pre-arranged scheme, why should the plaintiff have appeared so coy, and so unprepared with the requisite money? Why should it have been necessary for Tree to coax as he did, and to finally offer to permit a portion of the proceeds to be applied on the old indebtedness? And if the theory of prior knowledge and participation must, in the light of Taylor's evidence, be abandoned, what is left to which to apply Clark's improbable story, or the evidence of the cabmen or of Moisey?

It may be, and doubtless is, the fact, that the plaintiff saw in the proposition an advantage to himself in exchanging new and better securities for the old. But he had a legal right to do that, and he has not yet by any means reached the end. The new notes have to be collected, and

he must first get back his \$5,000 in cash, the venturing of which is in itself very good evidence of good faith, before he begins to reap the expected benefit. \$1,000 of it has already disappeared, if our judgment in the Sydney Pearson case stands. And it would, I think, be a bold prophecy to make, that in the end his whole loss will be confined to that.

The appeal should, in my opinion, be allowed in all the actions except that against Sydney Pearson, with costs, and judgment granted in favour of the plaintiff for the amount of the notes and interest, and for his costs in the Court below.

The promissory note in question in *WILSON v. SYDNEY PEARSON* is one of the series in question. . . . but there is the additional defence that the note of defendant is not a note at all, that it is merely a copy of a note, and was so modified upon its face at the time of its delivery to Tree. The only evidence upon the subject is that of defendant, which must be accepted. He says that he had given a note for \$1,000 on the same understanding as the others had with Tree, but that, repenting, he had some days later demanded it back, that Tree subsequently gave it back, but asked for a copy of it. The body of the copy was written by Tree, but the signature at the end is that of the defendant Pearson. The blank form upon which the copy was made is one used by the Canadian Bank of Commerce. At the left is a considerable margin, with a scroll containing the name of the bank, and upon this margin was written the word "copy." The greater part of the margin, including the scroll and the word "copy" has apparently been smoothly cut off and entirely removed, but leaving the remainder of the document intact and apparently regular enough, and in form a promissory note.

The removal of the word "copy" and the subsequent uttering to plaintiff was, in legal effect, a forgery; and forgery is, at least *prima facie*, a good defence, although where the signature is, as here, genuine, it may not be, if defendant has been guilty of such negligence as to create an estoppel. The nature and character of what is in law such negligence has received recent and authoritative consideration in more than one case. And the approved definition appears to be that the negligence creating the estoppel must be directly connected with the actual negotiation of the

instrument to an innocent holder, prior negligence in the making or custody of the instrument not being sufficient. See *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559; *Baxendale v. Bennett*, 3 Q. B. D. 525; *Schopheed v. Earl of Londesborough*, [1896] A. C. 514; *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Lewes Sanitary, etc., Co. v. Barclay*, 22 Times L. R. 737.

There is, I think, no evidence of any such negligence. It was, of course, an unusual and even an extraordinary thing for Tree to ask or for defendant Pearson to give a copy of a note which had been wholly recalled. But defendant is a farmer, not perhaps much accustomed to such matters, and may have been for that reason the more easily persuaded to do what was certainly a very foolish thing. But the instrument he gave was in its then form a perfectly innocent affair, and could only be made effective as a note by the commission of a crime, and he was in no way bound to anticipate that.

The instrument sued on is not and never was a promissory note, and defendant has done nothing, in my opinion, to prevent him from proving that fact.

The appeal should, therefore, as to this defendant, be dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissenting (except in the Pearson case), was of opinion that the actions were properly dismissed, for reasons given in writing.

TEETZEL, J.

JUNE 6TH, 1907.

CHAMBERS.

OSTERHOUT v. FOX.

Costs—Scale of—Amount Recovered—Ascertainment—Covenant—Amount Due under—Deduction—Division Court Jurisdiction.

Appeal by defendants from the ruling of the taxing officer at Belleville that plaintiff's costs of an action in the

High Court should be taxed on the County Court scale, instead of on the Division Court scale, plaintiff having recovered judgment at the trial for \$193.50, and the trial Judge having refused to certify as to costs.

T. L. Monahan, for defendants.

J. H. Spence, for plaintiff.

TEETZEL, J.:—The action was to recover \$433 for alleged arrears of fixed annual sums secured to the plaintiff during his life under a covenant contained in a deed signed by the defendants, and also for damages for the defendants' failure to supply the plaintiff with certain articles, as provided in another covenant signed by them.

The trial Judge decided that the plaintiff had no cause of action in respect of the latter claim, but awarded him judgment for \$193.50 as balance due in respect of the money covenant, deducting payments made by the defendants.

Viewing the action in the light of the findings of the trial Judge, it seems to me impossible to say that this case was not of the proper competence of a Division Court, under sec. 72 of the Division Courts Act, as amended by 4 Edw. VII. ch. 12, and therefore under Rule 1132 Division Court costs only should be allowed.

The covenant signed by the defendants clearly fixes the annual payments, and therefore the original amount of plaintiff's claim is ascertained in the manner required by the Act, and no evidence is required beyond the production and proof of the document to prove such original amount.

The ruling of the taxing officer appears to have been influenced by an erroneous view of the pleadings and of the manner in which the trial Judge treated the payment of \$69. In his report he says: "In this action the amount actually found due by the trial Judge under the written agreement was over \$200, but the amount was reduced by the equitable allowance by the Judge in the way of set-off of the sum of \$69, reducing the amount to less than \$200, which is not set up in the pleadings."

What the trial Judge says is: "That for the annuity for 7 years in all the plaintiff is entitled to recover \$37.50, for each year, making a total of \$262.50, but against that must be offset the sum of \$69, which I find was paid by the defendants the Foxes to one Dunnett, a creditor of the

plaintiff, whom they had not in any way undertaken to pay as part of the bargain when they took the farm over, but whom they subsequently paid at the plaintiff's request. Deducting this sum leaves a balance of \$193.50, for which judgment must be awarded for the plaintiff with costs."

Among other defences the defendants plead payment, and, upon the facts as above found, the plaintiff should have given credit for the \$69, thus reducing his claim to Division Court jurisdiction.

The appeal must be allowed, but I think it should be without costs.

RIDDELL, J.

JUNE 6TH, 1907.

TRIAL.

MARRIOTT v. BRENNAN.

Principal and Agent — Agent's Commission on Sale of Land—Finding Purchaser—Sale by Principal to Another —Terms of Contract—Breach of Implied Contract to Accept Purchaser—Damages — Quantum Meruit — Amendment.

Action by estate agents to recover a commission of \$225 for finding a purchaser for land offered for sale by defendant.

R. G. Code, Ottawa, for plaintiffs.

E. J. Daly, Ottawa, for defendant.

RIDDELL, J.:—Defendant employed plaintiffs, who are a firm of real estate agents, to sell certain property of his in Ottawa, at \$9,000, for which they were to be paid by him at the rate of 2½ per cent. i.e., \$225, commission. They procured a purchaser able and willing to pay the price, and submitted a written offer from him to defendant. Defendant had in January given a written option to L. to sell him the property at \$9,000, which option expired 15th February. About the time at which the option expired it was renewed till 1st March. This was a mere offer to sell, without consideration, and in no way preventing defendant from selling to any one else if he felt so inclined. On Wednesday 27th February McC., the proposed purchaser, signed an offer to

purchase the property, and this was taken by Acres, one of the plaintiffs, to defendant on Thursday 28th February. Defendant made no objection to the terms of the offer to purchase, but said that he wanted to look into the matter. Beyond any question, he desired to make use of the offer of McC. as a lever to move L. to purchase, and thereby, if possible, avoid the payment of any commission. He went to L., told him that he had an offer for the property, and if L. wanted it he would have to act at once. L. bought, and thereupon defendant telephoned plaintiffs that he had sold to another.

I find the above as facts, and would add that I consider the evidence of all of the witnesses except defendant worthy of belief. I do not accept the evidence of defendant where it is contradicted.

Many cases have been decided, under not dissimilar circumstances, as to the rights of an agent for sale where the land is not sold to the purchaser whom he secures. These rights will, of course, depend upon the exact words of the contract. For example, if, as in *Adamson v. Yeager*, 10 A. R. 477, the contract is that the agent is entitled to commission only when the property is disposed of, he cannot sue for commission at all, but only for a quantum meruit. So, as in *Topping v. Henley*, 3 F. & F. 325, if the contract is for the principal to pay a commission if he procures a loan; or, as in *Packett v. Badger*, 1 C. B. 296, where the agent was to look out for a purchaser, stipulating for a commission of $1\frac{1}{2}$ per cent. of the purchase money; or, as in *Bull v. Price*, 7 Bing. 237, where the contract was to give the agent 2 per cent. on the sum obtained. In all such cases the agent is driven to a quantum meruit. But if the contract were that he is to find a purchaser able and willing to purchase at the stipulated price, then if he find such purchaser he has done all that he is called upon to do to earn his commission: *MacKenzie v. Champion*, 12 S. C. R. 649, 655.

I think that plaintiffs had done all that they were called upon to do when they on 28th February produced a purchaser ready and willing to purchase; and the conduct of defendant was inconsistent with fair dealing. . . .

[Reference to *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378.]

Whether in the present case, as I think, plaintiffs were only to find the purchaser, and have therefore done every-

thing they were bound to do to earn their commission as commission, or whether they were entitled only to a quantum meruit or to damages, I think immaterial. A proper amount to award as damages for breach of the implied agreement to accept a purchaser found by plaintiffs is \$225. A proper amount to allow for the work done by them is equally \$225. And, however the case be put, plaintiffs are entitled to receive \$225 from defendant.

It is, however, contended that the offer to purchase is not such as was contemplated. Defendant made no objections to the terms of the offer; no evidence is given that this is not the usual form of offer; and there is no foundation for the agreement that the offer is for a small part of the purchase money to be paid in cash and the balance in 10 days.

Judgment for plaintiffs for \$225 and costs on the proper scale. Any amendments may be made to the record which plaintiffs may be advised to make.

RIDDELL, J.

JUNE 6TH, 1907.

TRIAL.

SOVEREIGN BANK v. INTERNATIONAL PORTLAND CEMENT CO.

Equitable Assignment—Order for Payment of Moneys Payable under Contract to Creditors of Contractor — Validity as against Judgment Creditors of Contractor — Judicature Act, sec. 58 (5)—Assignment of Whole Debt—Security for Advances—Notice—Money in Custodia Legis—Interpleader Issue—Costs.

An interpleader issue, tried without a jury at Ottawa.

RIDDELL, J.:—A firm of Clement & Leal had a contract for paving with the corporation of the town of Perth. Desiring an advance from the Sovereign Bank, they went to the agency of the bank at Perth and arranged to give an assignment of all moneys due or to become due from the town under the contract as security for the repayment of advances to be made them.

A document was executed by Clement & Leal as follows: "From the Sovereign Bank of Canada, Perth, Ont., July 21, 1906. To Corp. Town of Perth. We hereby assign, transfer, and make over to the Sovereign Bank of Canada any money or moneys due or which may become due from the corp. of the town of Perth."

Notice was given as follows: "From the Sovereign Bank of Canada, Perth, Ont., July 23, 1906. To the Town Clerk, Perth, Ont. Dear Sir: Please note that we have taken an order from Messrs. Clement & Leal for any moneys which may become due them from the corp. town of Perth. If you hand us the cheques, we will see that they are properly indorsed by them. Yours truly, C. A. MacMahon, manager."

The following day the clerk of the town came into the bank and asked to see the order. This was shewn to and examined by him, and thereafter the moneys to which the contractors became entitled were paid by cheque drawn to their order but handed to the bank. The contractors were entitled only on account of this one contract to receive anything from the town, of which the bank manager was fully aware.

The contractors lived in Marmora, and on 12th November they made an assignment in Marmora, in the following words: "Marmora, Nov. (?) 1906. To the Corporation of the Town of Perth and to the Sovereign Bank of Canada, Perth. We hereby, for and in consideration of advances heretofore made to the undersigned, assign, transfer, and make over to the Sovereign Bank of Canada, Marmora branch, as a general and continuing collateral security, balance of the account against the corporation of the town of Perth now assigned to the Sovereign Bank of Canada, Perth branch." (Signed by Clement & Leal.)

This document was sent to the manager of the Sovereign Bank at Perth with a request that it should be shewn to the officials of the town, but this was not done. The bank manager at Marmora also knew that there was but one contract from which Clement & Leal would become entitled to receive money from the town.

Moneys were advanced from time to time by the Perth branch after the execution of the above assignment to them, but none by the Marmora branch after the execution of the assignment last set out above. To the Perth branch some

\$2,000 is still owing, and to the Marmora branch about \$1,060, with interest added in each case.

The International Portland Cement Company obtained judgment against Clement & Leal on 28th November, 1906, for \$1,195.22 and costs taxed at \$56.88, and procured a garnishing order on 18th December, whereby the town corporation were ordered to pay \$2,290.50, part of the moneys now in their hands, and by them owing to Clement & Leal, into the hands of the sheriff of the county of Lanark, under sec. 37 of the Creditors' Relief Act—as also any further sum that might become due to the contractors.

A number of creditors of Clement & Leal also obtained judgments against them in the Division Court, and on 6th May, 1907, an order was made by the local Judge at Perth for an interpleader issue, wherein the International Portland Cement Co. should represent all the judgment creditors, and the issue to be tried should be whether the moneys paid in or to be paid in to the sheriff were the property of the Sovereign Bank of Canada as against these judgment creditors.

This issue came down for trial before me at the Ottawa non-jury sittings, 3rd June, where the foregoing facts appeared.

The first matter which at the trial received attention is the question whether the said assignments are within sec. 58, sub-sec. 5, of the Judicature Act. This sub-section was introduced by 60 Vict. ch. 15, sec. 5, and is, totidem verbis, the English sec. 25 (6) of the Judicature Act of 1873 (36 & 37 Vict. ch. 66.) There have been many decisions upon the sub-section in the English Act, by which decisions I am, of course, bound: *Trimble v. Hill*, 5 App. Cas. 342, 344. I have not found it easy to reconcile all the cases. It is to be noted that the assignment must be an absolute one, not purporting to be by way of charge only, and to be of a debt or other legal chose in action.

At the trial it was admitted by both bank managers that the assignments they took were simply security for the repayment of the advances they made or should make. At first glance this would seem to bring them within *Mercantile Bank of London v. Evans*, [1899] 2 Q. B. 613. . . .

[Reference to that case and to *Comfort v. Betts*, [1891] 1 Q. B. 137; *Tancred v. Delagoa Bay R. W. Co.*, 23 Q. B. D. 239; *Durham v. Robertson*, [1898] 1 Q. B. 765; *Hughes v.*

Pump House Hotel Co., [1902] 2 K. B. 190, 197; Jones v. Humphreys, [1902] 1 K. B. 10.]

The test would seem to be, does the document purport to assign all the debt, though that may be simply security for a possibly smaller sum, or does it purport to assign only sufficient of the debt to secure the amount of the advance? . . . Cozens Hardy, L.J., considers that the Evans case was decided as it was because the Court held that there was not an assignment of the whole debt.

It is not, however, in the view I take of the present case, necessary to decide whether the assignments to the bank fall within the sub-section, if they can be considered good equitable assignments. If they are, since the creditors can take no higher rights than the debtor, the assignments must prevail here: Thomson v. Macdonnell, 13 O. L. R. 653, 8 O. W. R. 721; Neale v. Molineux, 2 C. & K. 672. And the fact that the money is in custodia legis does not injure, but, if anything, assists, the bank.

That the statute has not affected the principles of equitable assignment is clear: Durham v. Robertson, [1898] 1 Q. B. 765, 769, 770; Hughes v. Pump House Hotel Co., [1902] 2 K. B. 190, 196; Alexander v. Steinhardt, [1903] 2 K. B. 208; Lane v. Dungannon Driving Park Association, 22 O. R. 264; Quick v. Township of Colchester South, 30 O. R. 614; Elgie v. Edgar, 9 O. W. R. 614; Re McRae, 6 O. L. R. 238. . . .

Notice is not required to perfect the transfer as between assignor, assignee, and debtor; the effect and object of notice being to protect the assignee against further assignments or any other right of set-off and secure the debtor against other claims: Rennie v. Quebec Bank, 1 O. L. R. 303, and cases cited at p. 308.

The want of notice in the case of the Marmora assignment becomes immaterial if that be a good equitable assignment.

In view of the decisions in Lane v. Dungannon Driving Park Association and Edgar v. Elgie, in our own Courts, and of such cases as Tailby v. Official Receiver, 13 App. Cas. 523 in England, I think it impossible to say that either of the documents held by the bank is not a perfectly good equitable assignment.

Without deciding whether the bank could in either case have sued the town without adding the assignors as plain-

money paid in or to be paid in to the bank.

to dispose of the whole inter-
defendants will pay the costs of
iffs of the application for inter-
leading up to the order, also
and judgment. The sheriff will
moneys in his hands sufficient to
sums with interest, but not any
uld in no event come out of the
(s.) The remainder will be ap-
itors' Relief Act. The fees of
so far as they are applicable to
nk is declared entitled, are not
ut by defendants—the intention
enses of the sheriff and others
claim to the fund in the hands
ll be paid by those making the
nfounded. . . .

JUNE 6TH, 1907.

RIAL.

YORK COUNTY LOAN CO.

*Effect of Order — Continuance of
Company — Lease of Lands —
Covenant in Lease — Breach after
Sale of Liquidators—Sale of Pro-
perty Plaintiff—Damages for Breach.*

County Loan Co., a company in
Trust Co., the liquidators, for
tenant or provision contained in

for defendants.

September, 1904, the York County
the property since known as No.

5 High Park Boulevard for the term of 3 years and 5 months, the lease containing the following clause: "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same terms as in said offer."

On 16th December, 1905, an order was made declaring the York County Loan Co. insolvent within the meaning of the Winding-up Act, directing it to be wound up, and appointing the National Trust Co. provisional liquidators. . . . The trust company were afterwards appointed permanent liquidators.

On 31st January, 1906, the property, with a large number of others, was advertised for sale by the liquidators, and on 19th February S. C. Halligan made a written offer to buy at \$9,000. This was not carried out. On 7th May Halligan made another offer in writing to purchase the property in question with a few additional feet of land at \$9,450. This was on the same day approved by the official referee, and on 16th June the liquidators wrote to plaintiff that the premises had been sold to Halligan, and that plaintiff should in future pay rent to him. This was followed on 25th June by a letter from plaintiff's solicitors to the liquidators saying that the offer should have been submitted to plaintiff and he given an opportunity of purchasing before the sale was closed. The liquidators on 27th June answered that the property had been sold at the repeated requests of plaintiff's wife, and that "ample opportunity was given him to make an offer for the house if he so desired."

Plaintiff commenced and has since continued to pay rent under protest to Halligan. It was admitted that the property had been conveyed to Halligan, and that before the acceptance of his offer there had been no formal submission of the same to plaintiff and opportunity given him of purchasing on the terms of Halligan's offer.

The defence is based upon the contention that the clause in question in the lease is not binding upon the liquidators and that the property was sold with plaintiff's knowledge and consent and upon the request of his wife.

Before bringing action plaintiff applied to the referee for leave for such purpose, which was refused, but upon appeal Meredith, C.J., reversed the order of the referee and gave plaintiff leave to institute and prosecute such action on

ounty Loan Co. and the liquidation, and the material for that ap-
 rit of plaintiff and examinations
 mith and Frank B. Poucher, the
 ector of the trust company; so
 e before the Chief Justice.

ed by the defence, I am of opin-
 er in no way cut down the rights
 position as lessee of the pro-
 entitled to by virtue of the pro-
 urchase. The only effect of the
 vent the company from carrying
 o far as is, in the opinion of the
 e beneficial winding-up thereof;
 ll the corporate powers of the
 affairs of the company are wound
 ee. 20.

ith the approval of the Court,
 e company for the purposes of
 e " in the name and on behalf of
 c., and for such purpose use the
 4.

he company is being wound up,
 any, present or future, certain or
 ed or unliquidated damages, shall
 ust the company: sec. 69.

o be somewhat in the position of
 ed by the Court to represent the
 of the Act, not as an assignee,
 representative of the company for the

. The liquidator has power, with
 t, to sell the real estate of the
 liquidators were authorized to sell
 hey could sell only subject to the
 aintiff's lease; possession could be
 plaintiff's term, and the provision
 to purchase was, I think, equally
 r. When the liquidator obtained
 was in effect the company, which
 aining the offer, and having ob-
 uidators, I think, were bound to
 accordance with the terms of the

Plaintiff knew the liquidator was making efforts to sell the property; his wife led Mr. Smith and Mr. Poucher to think she wished it sold, so that she might leave and the lease be terminated, and these gentlemen supposed they were doing her a kindness by effecting a speedy sale, and taking for granted that plaintiff was taking the same position, they omitted to comply with the proviso in the lease. Mr. Smith, at an earlier stage of the liquidation, knew of the proviso in question, and doubtless, had it not been for the wishes of Mrs. McCarter, as he understood them, would have followed the conditions. . . . Plaintiff, however, says he was not aware of these requests. . . . ; that he had no opportunity to purchase upon the terms of the Halligan offer; and it is not suggested that he had. The letters shew that the position taken by the liquidators was that ample opportunity was given to plaintiff to make an offer if he desired. This is quite true, but plaintiff's right, I think, was more than that, and the liquidators were bound to give him the opportunity before accepting the Halligan offer to purchase upon the terms of that offer. This was not done. Plaintiff, I find, did not waive his right; his knowledge of the attempt to sell, of the advertising, etc., does not deprive him of his right under the contract, as I think. He says he would have purchased on the terms of Halligan's offer. I have no reason to suppose that is not the fact.

I think defendants the York Loan Co. are liable for breach of contract.

The damages are difficult to fix. Plaintiff values the property at \$11,000; Holmes, \$13,725; Polley, \$12,800. For defendants Poucher says \$10,000 now, and that the value has increased about 10 per cent. since the sale. Smith and Armstrong say it was well sold. Suydam says \$8,500 to \$9,000, and Pearson from \$8,000 to \$9,000. I am unable upon the evidence to fix the value with any accuracy. I feel that, as defendants were acting as they thought according to the wishes of Mrs. McCarter, the visitation of damages for breach of the contract should be upon the lowest reasonable scale, and these I fix at \$500.

Judgment for plaintiff against defendants the York County Loan Co. for \$500 and costs.

JUNE 6TH, 1907.

TRIAL.

ER v. CLARKE.

*of Moneys Arising from Contract
nt—Death of Donor—Solvency—
sue—Costs.*

Administrator of the estate of an in-
claiming a fund, which was part of
ate, under a voluntary assignment
etime.

l settled in modern law that to
signment by writing, no particular
led. An engagement or direction
debt or fund of money constitutes
f so much as is dealt with. When
erely of a voluntary character, is
the transaction between donor and
e right to obtain the money vests
ter is further prosecuted, and the
he custodian of the fund or the
ssignee is the only person who can
ve an effectual discharge. These
established by *Harding v. Harding*,
ck, [1891] 1 Ch. 87; and *Re Grif-*

enter into an examination of the
parties in order to see if any con-
k there was a valid and completed
by the deceased in favour of the
es, which was handed over to the
uthority for the payment to the
ce to be derived from the moneys
Penetanguishene contract, which
usly assigned to the bank. The
signment was not disturbed by the
moneys came to the hands of the
hew that had the moneys been re-

acted by the donor in delegation of the assignment having the effect of recovery of the amount might be had from his representatives.

The only question of difficulty is one arising on the facts which required the examination of witnesses, viz. whether or not the document was signed by the donor when he was in a competent condition, such as to his mind and his physical condition. Upon the evidence I think the proper conclusion is that he was not insensible on 30th day, 1906, and that he understood what he was doing when he put the mark to the paper. Through physical weakness he was probably not able to undergo the fatigue of signing his name to the papers then executed.

The costs have been chiefly, if not altogether, incurred by the condition of the deceased, which justified the administrator in claiming the fund in question now in Court. But it should be paid out ratably to mother and child after deducting their costs. No costs to the administrator, though he should get them from the estate. The amount to be divided is \$466, and half should go to each claimant. The infant's share to remain in Court subject to any claim the mother may have for maintenance.

JUNE 6TH, 1907.

DIVISIONAL COURT.

WATKINS v. TORONTO R. W. CO.

Street Railways—Injury to Person Attempting to Get on Car and Consequent Death—Negligence—Findings of Jury—Contributory Negligence—Ultimate Negligence—Dismissal of Action.

Appeal by plaintiff from judgment of RIDDELL, J. O. W. R. 702, dismissing action.

John MacGregor and E. A. Forster, for plaintiff.

D. L. McCarthy, for defendants.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.) dismissed the appeal with costs.

JUNE 7TH, 1907.

TRIAL.

C v. BISSONETTE.

*Simple Contract Debt—Payments on
Assignee for Benefit of Creditors under*

price of goods sold. Defence, Stat-

r plaintiff.

for defendant.

iff sold defendant goods at various
1900, to 28th February, 1901; de-
on account on 31st October, 1900.
endant made an assignment for the
the usual form; and his assignee
account of dividend applicable to the
ing made on 27th June, 1901, and
laintiff brought this action for the
on 15th February, 1907; the only
Limitations.

dictum of Bracton to the contrary,
was at the common law no limita-
which an action ex contractu could
Limitations, 2nd ed., p. 11. The
, be read with some approach to
Act of 21 Jac. I. ch. 16 still re-
seen that the statute itself contains
imple contract debt in terms saving
Such a saving has, however, as in
t, been held by the Judges to be
f money charged upon land, etc.,
ous Real Property Limitation Acts,
. 27 (Imp.), 37 & 38 Vict. ch. 57,
O. 1897 ch. 133, secs. 22, 23, there
yment of some part of the purchase
therein tolling the statute.

may be found in which a person in
r or the like has made payments on

now owned by me, and also the house wherein I live and the curtilage and outbuildings thereof." The devisee A. L. Thompson is the plaintiff.

The land and barn in dispute, if they do not belong to plaintiff, go to defendant Eleanor Jose in trust for her son William W. Jose, under another clause of the same will, which is: "I give and devise all those portions of the north halves of lots 26 and 27 in the 1st concession of the township of Clarke, now in the village of Newcastle, as yet undivided, unto Eleanor Jose, wife of Stephen Jose, in trust for her son William W. Jose."

If there can be found what exactly fits the devise, then that passes by the will, and parol evidence is not admissible to shew that the testator intended something else: *Lawrence v. Ketcheson*, 4 A. R. 406.

I allowed parol evidence only to shew the occupation of the devised property by the testator and those under him, to get his environment, to put myself, as far as possible, in his place or in the position in which he stood, and so get his mind when making his will. This is warranted: see *Weber v. Stanley*, 16 C. B. N. S. 698; *Stanley v. Stanley*, 2 J. & H. 491.

The will was made on 12th April, 1899, and the testator died on 9th May, 1905. The testator owned, with other lands, the east half of the north half of 27, the north half of 26, and the northerly 58 acres of 25, all in the 1st concession of Clarke. His residence was at the north-east corner of the west half of the north half of lot 26. Attached to his residence was a lawn, to the south of the lawn was a garden, and to the south of the residence were kitchen, shed, and outhouse. . . . The residence and all just described are and were wholly enclosed. Farther to the south and adjoining the residence property is a triangular piece of property, enclosed, narrowing to the south, and terminating at a point where the crossing was usually made to enter upon the east half of the north half of lot 26. On this triangular piece of land is a barn. Between the barn and the land enclosed with the residence is what is called the barn-yard. Plaintiff claims this triangular piece of land with the barn upon it, and the right of way, as passing to him under the will. Plaintiff claims under the word "curtilage" and also that the barn is an outbuilding mentioned in the will and intended by the testator.

89, the testator leased to the Col-
the north half of 26 in the 1st
cept the dwelling-house, out-build-
the part of said lot then occupied
reserving to the lessor a right of
e lying immediately upon the east
se. This lease was for 15 years
and it expired on 1st April, 1905.
on 1st April, 1904, a new lease
A. A. Colwill of the same property
ceptions as to property for 5 years.
1st April, 1909. At the time of
the testator was residing in the
y occupied by Mrs. Baker. As a
and now occupies the barn. No
ward to the use of the barn-yard.
property more or less upon it from
after Mrs. Baker left down to his
t, as apparently the testator did
erve the barn or expressly reserve
lease, he did not intend to devise
the lease he used the word "out-
ose directly connected with and at-

y a professional man. Technical
y understandingly used, by the tes-
curtilage " was intended to cover
nd so separated from the farm as
he residence, it is difficult to get
r. He did not mean barn or land
e could hardly have intended the
yard to the south of the lawn.
ling " within the fair meaning of
ed. It was in an enclosure separ-
efendant, and connected more im-
ndence given to plaintiff. I am
ard and triangular piece of ground
of the barn is what the testator
urtilage," and that he intended to
ord "out buildings." . . .
y binding upon me that would ex-
arn from coming within the mean-

The word "curtilage" is distinct from and means more than "dwelling" or "residence" or "house." It is distinct from "garden" and from "lawn." The property in question would not pass under any of these words. . . .

[Reference to *Steele v. Midland R. W. Co.*, L. R. 1 Ch. 275; *Wright v. Wallesy*, 18 Q. B. D. 783.]

If the testator had stopped with the devise of "the house wherein I live," it would have been a cogent, perhaps complete, answer to say that the barn and yard were not intended, as not necessary to the complete enjoyment of the house, but here the word "curtilage" is added with the word "outbuildings," and I think that word applicable only to the land enclosed extending southerly from the northerly limit of the enclosure in which the barn stands. . . .

[Reference to Bl. Com., vol. 4, p. 224; *Jacob's Law Dict.*, "Curtilage;" *Regina v. Gilbert*, 1 C. & K. 84; *People v. Taylor*, 2 Mich. 250.]

Nothing in the cases cited or that I have found precludes me from holding that the words "curtilage" and "outbuildings" in the will under consideration include the enclosure and barn in dispute.

The action was not premature. Any decision as respecting the rights of the parties to this action in regard to what they respectively take under the will, cannot affect the rights of creditors, if any.

This judgment does not affect the lessee. He will hold under his lease until the term expires or other termination of it.

This is simply a contest between the parties to the action. No other devisee is interested. It is a case in which I cannot say that plaintiff was wrong in bringing the action or that defendant should not have resisted. The point for decision is an interesting and important one.

I think there should be no costs to the plaintiff or to the defendants, except the costs of the official guardian, and I think plaintiff should pay his costs. Plaintiff gets a valuable property, and the infant defendant does not get a farm building which he naturally thought might be regarded as belonging to his part of the farm rather than to the farm devised to plaintiff.

JUNE 7TH, 1907.

FAL COURT.

v. BISHOP.

*Conveyed to Son of Tenant—
Declaration of Trusteeship—Im-
pugnance—Appeal—Duty of Ap-
pellate Trial Judge,*

from judgment of MAGEE, J., 8

defendant.

plaintiff.

rt (FALCONBRIDGE, C.J., BRIT-
delivered by

is a puzzling one, and the
difficulty in arriving at a con-
cre us, it was urged that he had
the evidence on behalf of the
ntly been led into error in his
of an appellate Court in an ap-
questions of fact has been dis-
—I know of none in which that
ghlan v. Cumberland. [1898]
al from the Judge is not gov-
to new trials after a trial and
ere, as in this case, the appeal
he Court of Appeal has to bear
rehear the case, and the Court
ls before the Judge with such
e decided to admit. The Court
n mind, not disregarding the
at carefully weighing and con-
g from overruling it if on
t comes to the conclusion that
Then, as often happens, much
bility of witnesses who have
xamined before the Judge, the
great advantage he had had

in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses."

The evidence in this case is hopelessly contradictory; and the conclusions to be arrived at must depend upon the credibility of the witnesses; and I can find no reason for disagreeing with the findings of the trial Judge. It is, if one were to judge by the words of the witnesses as they appear in cold black and white, and by these alone, more than likely that another tribunal would give more effect to certain parts of the evidence of the defendant—for example, the declaration made by the plaintiff in presence of Mr. Creswicke—but the effect of this declaration and the plaintiff's knowledge of its contents must depend upon the intelligence and honesty of the plaintiff, which the trial Judge alone could rightly gauge. And there is no rule which binds a trial Judge to wholly believe or wholly disbelieve a witness. The witness may be absolutely discredited and disbelieved in one part of his evidence, and wholly believed in another—that is for the trial Judge to decide. In *Kew v. City of London*, 9 O. W. R. 224, I considered the great advantage the trial Judge has in that respect.

Had the learned trial Judge found the facts diametrically opposite from those as found, I do not think the Court could interfere, and equally I cannot see how the Court can interfere with the judgment actually made.

The appeal should be dismissed. The litigation is most discreditable to both parties—there should be no costs of the appeal.

BRITTON, J.

JUNE 7TH, 1907.

TRIAL.

WOOD v. BROWN.

Costs—Third Party Proceedings—Dismissal of Action against Defendant at Trial—Discretion—No Costs.

Question of costs of third party proceedings where action dismissed against defendant at the trial.

close of the trial I gave judgment on costs, but reserved the question of proceedings. There was a third party, Mahon, who, it is said, sold the defendant. Mahon appeared and did thereupon defendant obtained an agent at London for the trial of the third party for indemnity, contra defendant, at the time of and

any question of liability as between or as between defendant and third party, not, in my opinion, be liable for the third party's claim to the horse was not affected by the dealings between defendant and third party, not as to the question of credibility to be dealt with in determining the liability of the third party and defendant.

It is said that there were, in regard to the dealings, very intimate and confidential dealings between defendant and third party. Upon the exercise of my discretion, I think the third party is entitled to costs, and that defendant should pay the third party in. See *Re Salmon*, 10 D. 358.

JUNE 8TH, 1907.

TRIAL.

OWS v. ALLEN.

Widow's Life Estate to Widow with Power of Sale given to Executor—Quit Claim by Executors to Widow to Child—Will of Widow—Acceptance of Quit Claim—Conveyance in Another Parcel—Exercise of Power of Sale—Partition.

For sale of lands in the city of Ot-

C., for plaintiff.

For defendant.

RIDDELL, J.:—John Burrows, of Bytown (now Ottawa), on 16th January, 1848, made his last will and testament, still of record in the Court of Probate, Toronto. The clauses of importance are as follows: "Also the parts shewn in the accompanying sketch . . . numbered 5, 6, 7, 8, 9, 10, 11, and 12, on which the Chaudiere Cottage and other buildings were erected, shall be in charge of my beloved wife. Should it hereafter be found advisable to dispose of the same, it may be done by my executors with the consent of my wife, but should such disposal be found unnecessary, then shall my beloved wife enjoy any benefit that may arise therefrom by building or other improvements erected thereon during her lifetime, and that she may dispose of the same to her surviving present minor children, her daughter Armanilla Andrews to be considered one of them, by will."

Then a codicil made 29th January, 1848, provides: "I do desire that the lot commonly called the Cottage lot and other parts adjoining or marked in the aforesaid sketch accompanying this will, and being Nos. 5, 6, 7, 8, 9, 10, 11, and 12, as already noticed in my will, cannot be sold in any wise without the consent of my beloved wife, or shall it be advisable to sell any part or parts of the said Cottage lot or lots adjoining as above mentioned, the proceeds of such sale shall be lodged in a bank in the name of my beloved wife, to be drawn out by her when required for the benefit of the estate or her children or at her disposal, as already stated."

Letters of probate were granted by the old Court of Probate (Lord Elgin being Judge thereof), and the will and codicil "proved, approved, and registered" 14th September 1848, the executors proving being William Peters, the Rev. J. C. Davidson, the Rev. William Andrews, and Henry Burrows.

A memorial of an indenture of quit claim is produced from the registry office shewing that on 25th February 1861, the executor and executrix of William Peters and the other 3 executors of John Burrows "did bargain, sell, and quit claim" to the widow certain of this land for the alleged consideration of \$100.

In April, 1889, the widow grants in fee all that remains of this property to her daughter Armanilla Andrews; and she in August, 1889, sells to defendant. This may be called land "A."

land, which may be called land
quit claim to the widow, also
defendant through mesne con-
Mrs. Andrews, 13th April, 1889;
Nichols, 13th May, 1889; and
ant, 8th February, 1890.

possession since the conveyances

11th September, 1896. This
ch, 1906, by one of those (as is
"minor children" in the will

if there are any, as to parties,
the whole question for determin-
widow to convey as she did.

en, nor any evidence other than
n of, the patent from the Crown
robate of the will of the widow,
my freehold property, my lease-
property, and all claims of every
my dear children named—" the
another.

for the present to land "A," I
f that if the conveyance by his
ee, he is entitled to some inter-

If the will operates as an ap-
her, authorized by the will of
an appointee; as to which see
167; *Rogerson v. Campbell*,
617. And, if not, the general
the absence of appointment; as
ailcox, 5 My. & Cr. 72, 92; Mc-
312, and cases cited. If there
im as being of the heirs-at-law
ue via, the plaintiff would have
Mr. May candidly admitted this,
depends upon the interpretation

seems to me, contain in effect a
th power to the executors to sell
e, paying in case of a sale the
the credit of the wife for her
le be not deemed advisable, the

wife to have the full advantage of her life estate and power by will to dispose of the property to her "minor children."

No evidence is given, no fraud or collusion is even charged. The executors seem to have thought it necessary—or at least advisable—to dispose of the property and to dispose of it to the widow. For all that appears, she was willing to pay more than any one else, and the sale to her was a most advantageous one for the estate. She was not an executor or a trustee, even if that could be urged in an action constituted as this is. Her acceptance of the quit claim, followed by her acts in requiring the memorial thereof to be registered and in dealing with the property as her own, sufficiently shews that she consented to the conveyance. So far as appears, the purchase money may have been paid into the bank, and the estate received the advantage of it. Unless I must hold that the power given to the executor to dispose of the land carried with it a prohibition against disposing of it to her, I cannot hold the quit claim to be ineffectual. Independently of authority, I should have arrived at the conclusion that such is the case; but authority is not wanting. . . .

[Reference to Lewin on Trusts, 10th ed., pp. 551, 552; Howard v. Ducane, 1 T. & R. 81, 85, 86; Bevan v. Habgood, 1 J. & H. 222; Boyce v. Edbrooke, [1903] 1 Ch. 836; Dickin-son v. Talbot, L. R. 6 Ch. 32.]

Instead of the position of a tenant for life in this regard being altered for the worse, the tendency seems the other way, e.g., it is now held that trustees having a power without the consent of the tenant for life to lend trust funds on personal security, may lend them on personal security to the tenant for life: *In re Lang's Settlement*, [1899] 1 Ch. 593. The proposition to the contrary in Lewin on Trusts, 10th ed., p. 335, purporting to be founded on *Keays v. Lane*, L. R. 3 Eq. 1, is not followed.

I am not insensible to the fact that the widow in this case was not precisely a tenant for life by a certain tenure, and that her tenancy for life must cease with the exercise of the power of sale; but I am quite unable to see how her position is thereby altered for the worse so as to incapacitate her from taking a conveyance of the land.

The action should be dismissed in respect of this parcel.

The parcel which we have called "B." is on a different footing. Without any deed or conveyance to herself, the widow purports to convey the land in fee by her deed of

the right to convey her life estate, secure tenure, and consequently the effective. Beyond her life estate they; and it cannot be successfully was an exercise of the power of will of her husband. "A power to be executed by deed, and equity, apt is made:" Farwell on Powers,

another the plaintiff took some interest sufficient to entitle him to a and.

what that interest is—it may be the office on the reference I shall

there will be a declaration that plaintiff to compel partition of land "B." the 956 (1) and under the Partition 23, referring it to the Master at law under the usual form of judgment.

proceeded in part, there will be no the Master will report specially as and further directions and further be disposed of by me.

JUNE 8TH, 1907.

COURT.

TO ELECTRIC LIGHT CO.

Barry Gate—Jarring House Adjoining—Damages—Obstruction of Fence—Disputed Boundary—Plan—Counterclaim—House Leaning and—Injury to Fence and Gate—Prescription—Conflicting Judge—Appeal.

from judgment of MACMAHON.

dants.

tiff.

The judgment of the Court (BOYD, C., ANGLIN, J., MAGEE, J.), was delivered by

BOYD, C.:—This appeal turns entirely on matters of evidence. The witnesses give contradictory accounts of the state of the house, and the trial Judge, to appreciate the situation to better advantage, viewed the premises in person. The chief dispute is, whether the east wall of plaintiff's house has gradually settled in a slanting direction over on the premises and buildings of defendants—or was originally constructed out of the plumb line. Two witnesses who are provincial land surveyors, one called for the plaintiff (Sewell) and one for the defendants (Speight), agree in the opinion that the slant to the east was in the wall 18 years ago, when the building of defendants was first erected. And two of the witnesses, one called for the plaintiff (Sewell) and the other for the defendants (Froude), a bricklayer, agree in the opinion that plaintiff's house, when originally built over 40 years ago, was put up carelessly with a slant to the east in the east wall of the house, as it stands very much in the same condition to-day. There is other evidence of old witnesses who say that the house and the wall to the east are in about the same condition as they always have been, and that there are no perceptible indications of any recent subsidence.

Three witnesses called for defendants think that the wall has settled to the east on account of decayed sills on that side—but the obvious evidence on the ground that the slant must have existed 18 years ago, as pointed out by defendants' witness Speight, and that defendants' building was put up so as to conform to that slant, rejects the theory of recent decay of the sills.

It is a case of conflicting evidence; the Judge has seen and heard the witnesses and has examined the place, and I am not able to say that the weight of evidence is not in favour of the conclusion that he has reached, viz., that the east wall has slanted over the land now held by defendants from the original erection of the building, and that defendants are wrongdoers in attaching their gate to that wall and so using the gate as to shake the house and otherwise annoy the inmates.

I would, therefore, affirm with costs.

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ENDING JUNE 15TH, 1907).

JUNE 20, 1907.

No. 5

JUNE 10TH, 1907.

MEMBERS.

E. v. YOUNG.

Jurisdiction — Action on Contract as to Forum for Action — such Provisions Illegal—Effect

prohibition to the 4th Division
t. The cause of action did not
dant reside within the territory
e contract sued upon contained
action arising upon it might be
ried on business, and waiving
h. 19, sec. 22.

ant.

arket, for plaintiff.

The Act of 1906 (6 Edw. VII.
expressly to protect persons like
n of contracts compelling them
of the province to defend them-
vision where the plaintiff resides
ingenious attempt is here made
dition of the words "and I here-
nefit of the Act 6 Edw. VII. ch.
' is a "proviso, condition, stipu-
ment" which provides for the
ne purchaser when making his

contract to waive his "right to the benefit of the Act," would be to deprive him of the protection provided for him by the Act, and the Act would become absolutely a dead letter.

Order made for prohibition with costs.

BRITTON, J.

JUNE 10TH, 1903

TRIAL.

VIVIAN v. CLERGUE.

Vendor and Purchaser—Contract for Sale of Mining Property—Action to Recover Instalments of Purchase Money—Lands not Conveyed to Purchaser but Possession Given—Terms of Agreement—Effect of Subsequent Agreement—Rectification—Action for Damages—Election to Treat Contract as Rescinded.

An action to recover money under an agreement for the sale of mining property in the districts of Algoma and Nipissing.

W. M. Douglas, K.C., and A. H. F. Lefroy, for plaintiff.
W. E. Middleton, for defendant.

BRITTON, J.:—Plaintiffs by their agent on 20th June 1903, offered to sell to defendant property consisting of 3,066½ acres for \$125,000, payable as follows: \$500 as a deposit upon signing the agreement; \$4,500 upon completion of purchase; and \$120,000 in 5 yearly instalments of \$24,000 each in 1, 2, 3, 4, and 5 years from date of offer, with interest at 5 per cent. per annum, at the time of each instalment, on the whole amount that might from time to time remain unpaid. The purchase was to be completed on 15th July, 1903, at the office of Lefroy & Boulton, Toronto, and defendant was then to be given possession. It was further stipulated and made part of the offer that defendant, as soon as he had paid three-fifths of the total purchase money together with all interest accrued on the whole, should be entitled to call for a transfer of the lands, upon a good and sufficient first charge and mortgage being executed upon the whole of said lands to the vendors to secure payment to the

use money and interest. Defendant, July, 1903, to examine the title, pay proportion of taxes and interest, and after that date defendant the offer contained this special all respects be of the essence of unless the payments are punctual in the manner above mentioned, occur before the execution of the of mortgage above mentioned, be null and void and the sale, you shall have no right to re-use money already paid."

Defendant accepted the offer in these terms on behalf of myself or assigns to become the purchaser of the land on the terms and conditions therein

It was made as to ore extracted from the land in full of the purchase money, consideration in this action.

Plaintiffs accepted from defendant \$4,500, at 4 months from that instalment, and defendant was to pay for the lands. Defendant put the lands as caretaker, and the amount never been questioned or counter-paid at maturity, and plaintiffs the amount of it and interest, and defendant paid.

When there fell due the instalment of interest for one year on \$120,000 plus \$6,000, making \$30,000. This

Then, defendant assigned his rights in the Standard Mining Company of 10th March, 1905, plaintiffs, the defendant entered into a new agreement. It was to sell this same property for \$100,000, on which the original deposit to defendant was to be credited. Of this sum, \$10,000 with interest and costs, representing the balance against defendant, was to be paid in five yearly instalments were to be paid

on 23rd June in the years 1905, 1906, 1907, 1908, and 1909 together with interest to be computed from 23rd June, 1903. This agreement is a very elaborate and carefully prepared instrument, but it is not necessary for my present purpose to refer to any of its provisions other than the following:—

(1) The mining company were not to be given possession of the lands until the judgment for \$4,500 and interest and costs and a further sum sufficient to make \$10,000 had been paid.

(2) Upon the execution and delivery of that agreement the mining company were for all purposes substituted for the defendant and in the place of defendant with respect to the first agreement, . . . which was to be deemed merged in the latter agreement, subject to this, that the latter agreement and anything that might be done thereunder should not affect or prejudice the claim of plaintiffs against defendant in respect of the sum of \$24,000 which fell due on 23rd June, 1904, and that maturing on 23rd June, 1905, or upon the interest on the unpaid purchase money up to the date of the assignment, viz., 19th January, 1905, or prejudice the rights of defendant with reference thereto, but until the purchasers shall pay the first and second instalments of \$24,000 each, with interest as aforesaid, the rights of plaintiffs and defendant shall remain as then existing in respect of these instalments and interest. That agreement recited that plaintiffs made the claim, as now sued for, and that defendant resisted that claim, asserting that there was not any personal liability on his part for anything beyond the judgment recovered upon his note for \$4,500.

This action is therefore brought to recover the amount due 23rd June, 1904, on principal \$24,000, the part of the instalment due 23rd June, 1905, say 7-12 of 24,000, say \$14,000, and interest for 1 year and 7 months from 23rd June, 1903, to 19th January, 1905, on \$120,000, say \$9,500 in all approximately \$47,500.

The defendant alleges that it was expressly understood and agreed that he was not to be personally liable for an amount beyond the deposit and the promissory note given by him, and he asks, in case there is liability under the agreement as it stands, that it be reformed to make it express the true intention of the parties.

No case has been made upon the evidence for reformation.

dition to the action brought by
upon the note, they commenced
ed on 27th January, 1904, for
tract. This, so far as appears,
writ — at all events it was not

that plaintiffs, by bringing that
n of defendant's default, treated
and defendant invokes the provi-
upon default the contract shall
ntiffs had proceeded with their
d, or had recovered damages, the
ferent, but not having done so,
ven up possession of the land,
greement of 10th March, 1905,
greement as in force as of that

there was no conveyance of the
f the purchase price agreed upon

In the absence of special agree-
e of the land delivered or ready
ecedent to the recovery of pur-
press agreement the conveyance
payment of 3-5 of the purchase
erest, had been made.

liable for the instalment which

es must now be determined as

1905. At that time plaintiffs

suited for the instalment falling

that agreement does not provide

er that agreement was executed,

ne able to convey to the defend-

emanding payment. They were

othing of right theirs, and as to

ted and continued by the agree-

ling a further sum not recover-

adant on 10th March, 1905, and

aintiffs as to anything maturing

reement are in the same position

ession by reason of defendant's

y to another. To entitle plain-

what the agreement permits,

eadiness to do their part. See

Wilks v. Smith, 10 M. & W. 355. I do not regard this case as in conflict with Laird v. Prim, 7 M. & W. 474; see Mattock v. Kingslake, 10 A. & E. 50. . . .

Judgment for plaintiffs for \$33,556.70 with costs.

BOYD, C.

JUNE 10TH, 1907.

TRIAL.

LAMONT v. WINGER.

Fraud and Misrepresentation—Purchase of Property—False Representations as to Business—Findings on Evidence—Dismissal of Action—Suspicious Circumstances—Costs.

Action to rescind an agreement for the purchase of a creamery, etc., upon the ground of misrepresentations.

BOYD, C.:—The decisive issue upon the record is raised by the 6th paragraph of the claim: "The plaintiffs, relying on the statements contained in said book prepared by Fred. Smith, as agent for the defendant, and upon the further assurance by the defendant to the plaintiffs that the statement so prepared and delivered was correct, agreed to purchase the said properties and plant." The evidence in support of this charge is given by one witness only, viz., the plaintiff Lawrence, in these words: "Mr. Mitchell and I went to see Mr. Winger and took that book with us and shewed it to Mr. Winger, and I asked him if that statement was correct, and he said to the best of his belief it was." He says further about this conversation: "We want your assurance that we are perfectly safe in buying the creameries on that statement, and that that statement is correct." Mr. Winger said: "You are perfectly safe in buying the creameries on that statement." . . . Mr. Mitchell was not examined—he is said to be in Scotland. Mr. Winger negatives giving any such assurance or vouching for the accuracy of the statement. He did not know personally as to the output of the business in the years covered by the statute, and could only speak from information derived from the Smiths. He kept himself, therefore, as he says, from pledging his own word as to the correctness of the statement,

though he believed that it might be depended on, as he had always found Fred. Smith to be trustworthy.

I think this particular issue presented on the record should be found in favour of defendant, and that the further evidence about safety in buying is not sufficient to satisfy the onus resting on the plaintiffs, even if the words used amount to more than an expression of opinion. It is not proved, I think, that defendant acted fraudulently in what he stated to plaintiffs.

Apart from this issue, the result of which is fatal to the success of plaintiffs, there are many circumstances of a most suspicious character in the transactions as developed in the evidence. . . . The refusal of Archibald Smith to produce the books of the creamery business for 1904 and 1905 has not been justified by any credible evidence. It is not, perhaps, very material whether defendant was owner or Archibald Smith, but I think plaintiffs understood they were dealing with Winger as the owner or an owner chiefly interested. I doubt whether the statement furnished by Fred. Smith is even approximately accurate as to the output of 1905, but, on the other hand, the evidence is halting as to the receipts from the Canadian Pacific Railway Company of butter shipped for the year 1905, being inclusive of all the output for that year. . . . The truth probably is that there was a considerable shrinkage in the operations of 1905, which was not disclosed by the Smiths, but I am not sure that it was known to defendant Winger before the close of the sale. I may suspect, but in a case of this kind the proof should be more satisfactory than I find it here.

The main issue tendered has to be decided in favour of defendant, and as to so much of the litigation he should have his costs. But as to the rest of the contention, I do not find that he or his associates, the Smiths, have so cleared themselves of suspicion or have acted so commendably as to merit an award of costs in their favour. To save the expense and delay of apportionment, I now direct that the action shall be dismissed, and that one-half the costs of litigation shall be paid by plaintiffs to defendant; otherwise no costs to or against either party.

JUNE 10TH, 1907.

DIVISIONAL COURT.

OSBORNE v. DEAN.

*Carrier — Ship — Detention of Goods Carried — Replevin—
Damages—Freight—Demurrage—Costs—Set-off.*

Appeal by defendant from judgment of MACMAHON, J.,
9 O. W. R. 889.

F. E. Hodgins, K.C., for defendant.

W. A. Finlayson, Midland, for plaintiffs.

THE COURT (MULOCK, C.J., ANGLIN, J., RIDDELL, J.)
dismissed the appeal with costs.

JUNE 10TH, 1907

DIVISIONAL COURT.

WEBB v. HAMILTON.

*Fraudulent Conveyance — Action to Set aside — Absence of
Knowledge of Fraudulent Intent on Part of Grantee.*

Appeal by defendant Anderson from judgment of
MABEE, J., in favour of plaintiff in an action to set aside
conveyance of land by defendant Isaac Hamilton to defend-
ant Anderson, in the circumstances stated below.

The appeal was heard by FALCONBRIDGE, C.J., BRIT-
TON, J., RIDDELL, J.

J. Cowan, K.C., for appellant.

J. M. McEvoy, London, for plaintiff.

RIDDELL, J.:—The plaintiff had brought an action of
slander against the defendants Isaac and Elizabeth Hami-
ton, and that being set for trial at Sarnia, the defendant
Isaac Hamilton made a conveyance on 28th September, 1903,
of certain property, a house and lot in the hamlet of Court

defendant Anderson, for the alleged
The action went down to trial, and
in a judgment by consent for plain-
costs. These costs were taxed at
number, 1905, this action was brought
eth Hamilton and Mary Anderson
nce as a fraud upon the plaintiff.
set aside the conveyance as fraudu-
defendants to pay the costs. Mary

found as follows: "I have no hesi-
ing at the conclusion that this was
of the defendant Isaac Hamilton
in such a position, along with this
plaintiff would not be able to reach
getting an execution; that his sister
his desire to get his property out
he, as his sister, desiring to assist
as a means of ridding himself of
that the plaintiff might not be able
execution against him."

supported by the evidence, it is
must stand—the matter is concluded
Court of Appeal in *Cameron v.*
adopt the language of Osler, J.A.,
y to be that if the purchaser knows
grantor is to defraud his creditors,
a valuable consideration, and that
d to pass to him, will not avail him.
s on his part, that is to say, ignor-
ntent on the part of the vendor.
was not a creditor . . . was,
the protection (the word is wrongly
f the statute of Elizabeth, and en-
ment, to attack any transaction de-
nder, delay, or defraud" her.

whether the findings of the trial
he defendant Isaac Hamilton there
candidly admits that one of his
protect himself from the plaintiff.
erson, while she knew of the litiga-
this "lawing" was making her
urtright uncomfortable, I am un-
dence more than once, to find that

she had any knowledge of the fraudulent intent of her brother. She had money of her own, she was accustomed to do business for herself with this money, she had lent the brother money at least once before, she had had dealings with property, the price alleged to be paid was a reasonable one. All the defendants deny that any conversation took place about the law suit at the time the alleged bargain was made; the law suit is said not to have been a topic of conversation in the family, as it was a "dirty one," and beyond question \$465 of the \$800 purchase money was paid by the purchaser to the vendor. Even if we were to say that the defendants are not worthy of belief, the furthest that would take us would be to disregard their evidence altogether, not to find as a fact the reverse of what they depose to. I think that it may fairly be said to be proved for the plaintiff that Isaac Hamilton was in possession of funds from which he might have handed over to his sister the money she is alleged to have paid him, and that the transaction throughout is a suspicious one. But beyond suspicion the case does not go; and in a case of this kind suspicion is not enough. There must be some evidence upon which the Court can proceed; the fact that the parties are brother and sister is not sufficient to shift the onus from the plaintiff. I am unable in this case to find anything upon which a trial Judge could base a finding that this "conveyance was in fact executed with the intent to delay and defeat creditors."

The principles governing are so clearly and authoritatively laid down in such cases as *Cameron v. Cusack*, 17 A. R. 489, *Hickerson v. Parrington*, 18 A. R. 635, and *Gurofski v. Harris*, 27 O. R. 201, that it would be useless to restate them.

"The case . . . is one of that class in which in order to defeat the deed there must be proof of an actual and express intent to defraud creditors, and the purchaser must be shewn (not suspected) to have been privy to such intent:" 18 A. R. at pp. 640, 641, per Osler, J.A.

I am of opinion that the appeal of Mary Anderson should be allowed with costs, and the action as against her be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., dissented, for reasons given in writing.

JUNE 11TH, 1907.

TRIAL.

McLAUGHLIN.

*Contract for Sale of Land—Mistake
of Contract—Specific Per-
formance—Misrepresentation — Removal of
Contract from Purchase Money.*

of a contract for the purchase
of lot 24 in the 14th concession
specific performance of the contract
by defendant for specific per-
formance drawn up and executed.

Wilson, Petrolia, for plaintiff.
Defendant.

Contract is in writing and is for the
Plaintiff alleges that he bought
The lot contains 210.3 acres.

, and for reasons then given, I
for reformation of the agree-
ment of the agreement as con-

and asks to have the written
contract.

posed he was buying the south
south 100 acres.

There has been a misrepresentation,
in the terms of the contract. I
think what may fairly be considered
so as to disentitle defendant to
the contract as asked in the

D. 215, 217. cited by defendant,
in the facts under consideration.
done plaintiff, performance of
enforced, although he would be
in this record I would be bound

conversation between one Henry
plaintiff's hearing, as to the point
defining the northern limit of the

land defendant was offering for sale would be, was definite enough to amount to misrepresentation by defendant, even if innocent misrepresentation, specific performance would not be enforced. It was not urged at the trial that there was any intentional misrepresentation—that, of course, would be fraud.

Defendant is entitled to have the contract performed. See *Powell v. Smith*, L. R. 14 Eq. 1; *Morley v. Clavering*, 29 Beav. 84; *Needler v. Campbell*, 17 Gr. 592; *Williams v. Felder*, 7 Gr. 345; *Campbell v. Edwards*, 24 Gr. 152; *Garrand v. Mukil*, 30 Beav. 445; *May v. Platt*, [1900] 1 Ch. 616.

Defendant has removed some timber. He was not careful of plaintiff's rights after the agreement. Plaintiff is entitled to a deduction of \$40. . . . The down timber belonged to the land. Plaintiff is entitled to the benefit of that: *McNeil v. Haines*, 17 O. R. 479; *Honeywood v. Honeywood*, L. R. 18 Eq. 306.

There is nothing in the objection that defendant was not ready to convey, or that the money was not ready on plaintiff's behalf. . . .

Upon payment within one month of \$2,660 and interest at 5 per cent. from 15th December to date of payment by plaintiff to defendant, plaintiff is to be entitled to a conveyance of the south 100 acres of lot 24. . . .

As plaintiff fails upon the matters in controversy, he must pay costs. Plaintiffs action dismissed with costs. Judgment for defendant upon his . . . counterclaim for specific performance as above without costs. . . .

TEETZEL, J.

JUNE 12TH, 1907

CHAMBERS.

ILLSLEY AND HORN v. TORONTO HOTEL CO.

Parties—Assignment of Claims—Action Brought in Name of Assignors — Want of Substantial Interest — Insolvency — Motion to Dismiss Action — Security for Costs — Authority of Solicitors — Correspondence—Costs.

Appeal by defendants from order of Master in Chambers. 9 O. W. R. 935, refusing motion by defendants for an order under Rule 616 dismissing the action, on the ground that

substantial interest in it, or in the alteration for security for costs.

defendants.

plaintiffs.

It can be no doubt that the action was properly duly given on behalf of plaintiff. It is manifest that the Imperial Bank is entitled to the fruits of the action, but it is not, while the bank holds transfers of the contract set forth in the state-ments. The necessary parties to any action notwithstanding the evidence of plaintiff are now thrown in his lot with defendants. It has been made to appear that the insolvency of the Imperial Bank, or that the defendants are insolvent. As stated by the court in *v. Pattison*, 1 O. L. R. at p. 41, "It may be given of the status and lack of interest of the plaintiff in litigation begun by the defendants to intercept it at the outset by costs." . . .

v. Mackenzie, 17 P. R. 18; *Gordon v. Gordon*, 32.]

The defendants have not, in my opinion, shown the insolvency of all the plaintiffs. No substantial interest in the litigation is shown under the authorities both these and by the defendants—the appeal must be allowed to the plaintiffs in any event.

JUNE 12TH, 1907.

CHAMBERS.

JOHN TON, GRIMSBY, AND BEAMS-
ELECTRIC R. W. CO.

Legal Fee—Trial or Assessment of Damages in Special Circumstances.

from the certificate of Mr. Thom. The only item complained of was his

allowance of counsel fee of \$125 at the trial. He applied item 153 of the tariff, "fee with brief at trial." The defendants submitted that there was only an assessment of damages, and that item 152, "fee with brief on assessment, \$10," applied.

J. G. Gauld, Hamilton, for defendants.

W. A. H. Duff, Hamilton, for plaintiff.

FALCONBRIDGE, C.J.:—The action was one for damages for personal injuries. The defendants entered no appearance and filed no statement of defence. Notice of assessment was served by posting up. Both plaintiff and defendants issued commissions and took evidence thereunder in the State of New York. Defendants also obtained an order in Chambers for the examination of the plaintiff by medical practitioners. The case came on for trial (or assessment) at the Hamilton assizes. It was spoken to on one day and stood over until the next. The case was reached at 5 p.m., when the trial was begun, and continued until 7 p.m., when it was adjourned until 9.30 the next morning, and lasted from that time until 2 p.m. There was a verdict for plaintiff for \$7,500, from which the defendants appealed to the Court of Appeal and were unsuccessful in the appeal.

It would be a manifest hardship that under these circumstances the allowance for counsel fee should be limited to \$10, but it may be that item 152 is the only one applicable.

However, I think (though with diffidence) that the following considerations may prevail to sustain the taxing officer's judgment: there was no interlocutory judgment in the case, and there was no admission upon the record of the liability of the defendants; on the opening of the case counsel for defendants admitted that they did not intend to contest liability, and the only matter tried out was the quantum of damages. *Gath v. Howarth*, [1884] W. N. 99, is not in point, as there interlocutory judgment had been signed.

I think, in view of all the special circumstances of this case, it may be treated as a trial and not an assessment, and plaintiff's appeal will therefore be dismissed. There will be no costs of this appeal.

JUNE 12TH, 1907.

LY COURT.

SHIP OF MALAHIDE.

Settlement of Action against—Resolution—Offer of Settlement—Absence of Seal—Settlement not Binding on Resolution — Unexecuted Con-

m ruling of local Master at St.

plaintiff.

omas, for defendants.

obtained a judgment against defendant, for money advanced by him, which judgment was varied on appeal, the amount should be reduced by the amount established against plaintiff in respect of damages set up by defendants, and the Master at St. Thomas to inquire into such damages. Further directions and reference were reserved, but no money was to be paid by defendants in any

which had been entered upon by the Master at St. Thomas, the reference was adjourned. On the 26th and at the suggestion of plaintiff, a meeting of defendants' council was held, on 26th June, 1907, for settlement. At this meeting plaintiff accepted \$4,750 in full settlement of the claim, and pay all costs up to reference, and the reference.

unanimously adopted accepting the offer, and passed authorizing the reeve to sign a certificate that the case was settled, and to discontinue all proceedings.

No reference to the matter, nor was a memorandum of the settlement authenticated by corporate seal.

On 23rd January, 1907, counsel for both parties appeared before the Master and stated that the case had been settled, and after recording the resolution evidencing the settlement, the Master adjourned the reference.

On 12th February another special meeting of defendants' council was held, at which a resolution was passed rescinding the resolutions of 23rd January.

When the matter came again before the Master, counsel for defendants stated that defendants had repudiated any settlement, and desired to proceed with the reference. This being opposed, the Master, without objection, proceeded to take evidence as to the validity of the settlement, and ruled that the settlement was not binding on defendants. While other reasons are assigned by the Master, the objection chiefly relied upon was the absence of the corporate seal.

Plaintiff now appeals from the Master's ruling.

In discussing the question how a municipal corporation can be bound by contract, the fact must be kept in mind that the council is not the corporation.

Under the Municipal Act, the "inhabitants of every county, city, town, village, township," etc., are "a body corporate," and by sec. 10 "the powers of every body corporate under this Act shall be exercisable by the council thereof;" and sec. 325 enacts that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for;" and sec. 333 enacts that "every by-law shall be under the seal of the corporation," etc.

As shewing the tendency of legislation in regard to the necessity for municipal councils exercising their powers by by-law, it may be noted that sec. 326 of the Municipal Act, R. S. O. 1897 ch. 223, provided that "every council may make regulations," etc., but by 3 Edw. VII. ch. 18, sec. 70, this was amended by inserting the words "by by-law" after the word "may" in sec. 326.

This amendment was shortly after *Liverpool and Milton R. W. Co. v. Town of Liverpool*, 33 S. C. R. 180, holding that the regulations there in question could only be made by by-law.

Argument of counsel for the appellant was based on the contention that the agreement of settlement in this case was founded upon an executed consideration, and therefore neither a by-law authorizing the settlement nor an agreement authenticated by the seal of the corporation need be shewn in order to bind the corporation, as was held in *Mac*

and, 10 O. L. R. 668, 6 O. W.
y, [1903] 1 K. B. 772; Bernar-
Dufferin, 19 S. C. R. 581.

in those cases is that where the
supplied property to a municipal
or which the corporation was
or the property supplied is ac-
and the whole consideration is
to pay implied, and the absence
of the corporation is no answer
respect to the work done or pro-
rdin case, per Gwynne, J., at p.

ent case is in holding that the
ndants' promise or undertaking
tiff, so as to bring his case with-

the whole consideration consisted
tiff holds his judgment, because,
ect matter of the settlement in-
defendants' claims for damages
the action and reference, which
payable by either party.

ment, besides fixing the balance
the debt. embraced a promise by
ay the costs of the reference,
ats to assume and pay all the

It was, therefore, an agree-
s promises, apart from defend-
dgment, which promises were
consequently, a part of the con-
ee Leake on Contracts, 5th ed.,

, the case does not come within
ased upon agreements wherein
y executed.

is case to consider whether the
within the limitations of the
for the purpose of determining
aw was required authorizing the
opinion that, whether it does or
ment would require to be authen-
rate seal.

Independently of statutory requirements, the principle of the common law applicable to a corporation is that, it being an intangible, invisible creation of the law, it must have some tangible and visible method of expressing its will in a by-law or its assent to a contract. See Biggar's *Municipal Manual*, p. 41.

As stated by Rolfe, B., in *Mayor of Ludlow v. Charleton* 6 M. & W. 815, at p. 823: "It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience."

As affecting municipal corporations, the only exceptions to the rule that a corporation can only act by its seal, are in regard to, first, insignificant matters of every day occurrence or matters of convenience amounting almost to necessity; second, where the consideration has been fully executed, as in the cases firstly above cited; and, thirdly, contracts in the name of the corporation made by agents or representatives who are authorized under the seal of the corporation to make such contracts.

The nature and importance of the agreement in question are such that it clearly could not come within the first exception; I have already excluded it from the second; and there is no evidence to bring it within the third.

In *Mayor of Oxford v. Crow*, [1893] 3 Ch. 535, where a proposal had been accepted by a committee of the council subject to the council's approval, and the approval of the council was afterwards granted by resolution, but not under seal, it was held that the contract not having been under the seal of the corporation or signed on their behalf by any person authorized under seal to do so, or ratified under seal or part performed or acted on, could not be enforced by the corporation.

As illustrating that the Courts of this country require that contracts of municipal corporations should be strictly in compliance with their powers, *Waterous Engine Works Co. v. Town of Palmerston*, 20 O. R. 411, affirmed 19 A. R. 411 and 21 S. C. R. 56, may be referred to, where it was held

base of a steam fire engine which
sense that no acceptance of the
d not be enforced against a muni-
ny-law authorizing the purchase
Municipal Act, even although the
der the corporate seal, and a bill
ad been accepted by the mayor.
mitted with costs.

JUNE 13TH, 1907.

AMBERS.

L. v. LOVELL.

*in Injunction — Examination of
—Refusal to Answer Questions—
Questions — Full Disclosure —
Prepare for Examination—Pro-
uty of Examiner—Fraud—Privi-
olicitor as Witness—Discovery—*

commit defendant Lovell and H.
is for refusal to answer certain
nation as witnesses upon a pend-
junction.

r disposition after refusal of de-
taking suggested in an opinion

ffs.

defendant Lovell and others.

ant Case and the George A. Case

Wright.

et out the material facts of this
dum, in part reported 9 O. W. R.

their undoubted right, have de-
ing suggested; the plaintiffs have
m. I now proceed to dispose of

So long as Rule 491 remains a rule of practice, I think any party to an action having in good faith served a notice of motion may insist upon the attendance for examination of any witness; and, speaking generally, insist upon such witness answering all relevant questions as though he were called at the trial. Of course, it may happen that there is some preliminary question first to be disposed of, but in general full disclosure must be made: cf. *Northern Iron and Steel Co. v. Solway & Cohen*, 9 O. W. R. 709.

The defendant Lovell is a clerk in the office of Messrs. Blake, Lash, & Cassels, solicitors, and is the trustee through whom the transaction was carried out. That firm used his name in "the correspondence that passed shewing the negotiations with respect to the purchase and the carrying out of the purchase, and the disputes arising and how those disputes were settled." Lovell says he has not the custody of these, and the member of that firm who attended on the examination refused to produce them. A letter was written, probably more than one, by that firm to England, and one at least was signed by Lovell. Lovell does not know the contents of these letters, the whole matter having been in the hands of Mr. Anglin.

He must make all proper investigation to enable him to produce all documents in his power, and must produce them in the examiner's office, which were written to or by the said firm as solicitors for Mackenzie, in connection with this purchase, etc. Such of these documents as shew, or tend to shew, that the purchase was in reality for Case, or Case and his associates, must be allowed to be put in evidence. Any document as to which the witness pledges his oath that it does not, in his opinion, so tend, may be ruled upon by the examiner, subject to motion in the usual way. Counsel for the plaintiffs will not be entitled to see the document in respect of which the examiner rules adversely. See *Williams v. Quebrada R. L. & C. Co.*, [1895] 2 Ch. at pp. 757, 758.

Upon the argument of the question of admissibility, after the examiner has expressed his opinion in favour of admitting any document, counsel for all parties have a right to be heard. After argument the examiner may adhere to his ruling, in which case the document will be admitted, or change it, in which case the document will not be admitted.

Charges of fraud having been made apparently in good faith against Mackenzie, privilege does not exist: *Rex v. Cox*, 14 Q. B. D. 153; *Williams v. Quebrada R. L. & C. Co.* [1895] 2 Ch. 751.

ell is unable, for any reason, to give
shall under Rule 493 make an order
Mr. Anglin or such other witness as

all the papers of his client Foster in
roduce in the examiner's office, ex-
cations between solicitor and client;
Mr. Foster privileged. The strictly
is for Mr. Wright at the examina-
n, if asked, all papers bearing upon
ath as to the remainder, the ex-
as are not put in, as in the case of
not be compelled in advance to go
nge them or divide them into such
should not go in. No doubt, the
the plaintiff will find a way to avoid
this course would necessitate. No
upon being paid a reasonable fee for
the papers in advance and arrange
ght, not being a party, need not pro-
e any inquiry to qualify himself to
ay do either if he desires. He need
g but his own knowledge.

he banker through whom Mackenzie
hed out. He will produce all corre-
oronto branch and the head office of
mmerce, and all correspondence and
the purchase; so far as these tend
se was for Case or Case and his as-
nt and are to be admitted in evi-
rule as in Lovell's case.

s leave to apply upon notice for any
necessary to enable them to obtain

plication will be to the plaintiffs in
Lovell and the Dominion Brewery
t as to so much thereof as may have
uding in this motion the motion
to these extra costs, there will be
witnesses is entitled to the costs of
tion.

attend at their own expense to be

TEETZEL, J.

MAY 22ND, 1907.

TRIAL.

WADE v. ELLIOTT.

Bankruptcy and Insolvency — Assignment by Insolvent for Benefit of Creditors — Action by Assignee to Set aside Chattel Mortgage and Land Mortgage made by Insolvent—Previous Agreement—Absence of Knowledge of Insolvency by Mortgagee—Imputed Knowledge.

Action by Osler Wade, assignee in trust for the benefit of creditors of defendant James H. Drinkwalter, to set aside, as fraudulent and void and preferential as against the creditors of defendant Drinkwalter, a chattel mortgage executed by him to defendant Robert A. Elliott, on 25th October, 1906, for \$1,000 on all his stock in trade, comprised in his general store at the village of Centreton, and a land mortgage on his farm in the township of Haldimand, for the same sum, as collateral security. Defendant Elliott, who had been carrying on a general store at Centreton, entered into an agreement (which was in writing) dated 29th January, 1906, to sell the business to Drinkwalter, at 85 cents on the dollar, of the stock and fixtures as inventoried, payable half cash, and balance in 4 equal payments, spread over one year. The agreement contained this provision: "I also agree to give Robert A. Elliott, as security, mortgage on said stock till paid for, above stock to be kept up to the standard stock now carried, insurance loss, if any, payable to Robert A. Elliott." This agreement was carried into effect in March, 1906, defendant Drinkwalter then delivering to Elliott two promissory notes, one for \$400 dated 16th March, 1906, payable 6 months after date, with interest at 6 per cent., at the Dominion Bank, Cobourg, purporting to be made by himself and his brother-in-law Lewis Harnden, and the other for the same amount and same interest, of the same date, payable 9 months after date, purporting to be made by himself and his uncle Frank Waite. The chattel mortgage was not then executed. Drinkwalter paid the accrued interest on the first of the two \$400 notes, about the time it matured, and agreed to pay off the principal in two payments of \$200, within one month thereafter. He failed in this, and, Harnden having denied his liability as maker on the note, Elliott applied to Drinkwalter for the security by way of chattel mortgage which the agreement of sale provided for. Upon

mortgage at Centreton, it was agreed which was a third mortgage on the l two days later, by which a consid- e was given to Drinkwalter to pay ott, and Drinkwalter then received \$400, and a further note for \$175, d by Elliott as part of the cash pay-

ere duly registered and filed. On ter, on the application of the agent executed the assignment.

ce to support the allegation that de- s insolvent, to the knowledge of de- knowledge ought necessarily to be im- ct of the non-payment of the \$400

d as a witness on behalf of defend- he had ever joined with Drinkwalter note. There was no question of the \$175, which made up part of the

serted that the transaction was en- ood faith, without any fraudulent ring or having reason to believe that ut, and without the purpose or in- ng, or delaying Drinkwalter's credi- ed the fact to be that Drinkwalter, the securities and made the assign- ent circumstances, and that he had atrary.

before TEETZEL, J., at the Toronto t and 22nd May, 1907.

plaintiff.

g, and J. H. Spence, for defendant

ink the plaintiff in this case has at the defendant Elliott has satis- he law casts upon him, by shewing k the chattel mortgage in question ad no reason to believe that the nable to pay his debts in full. The ong upon its facts in regard to any be imputed to the defendant as the

Privy Council case which has been cited by Mr. McMaster. In that case there was, it appears, abundant evidence to create, upon the part of any one who knew the facts related there, the honest conviction that the debtor was insolvent, from the default that he had made in meeting his cheques and drafts.

Here, the only circumstances which seem to me to have been present to the mind of the defendant Elliott were, first, the circumstance that his own account had not been paid—his own note for \$400 as collateral to the general indebtedness was not paid by the maker on its maturity. When he met the debtor the debtor told him that he had had some trouble or difficulty, and I should say—although it is not very clear—that he told him he had been called upon to pay \$175, part of which he did not owe, which had taken the ready money he had promised to pay, the \$200 which he had promised to pay in two weeks, and another \$200 in another two weeks after that, so as to remove the whole of the \$400 liability, he having paid the interest up to 1st September. The only other circumstance is that these promised payments were not made, and that in response to his request sent to the banker to hustle the other maker of the note he was informed that there was some trouble about the note, that the maker was in some way repudiating it, and on the next day made up his mind that he would secure the account or have it paid, and in pursuance of that decision prepared a chattel mortgage and took it to the debtor to be signed. Now there is no evidence that he knew that there was any claim outstanding against the debtor at that time, other than his own. It may be said that he ought to have known there must be something owing for a portion of the stock, at any rate for the goods by which the stock had been increased since the debtor purchased the business from defendant; but the stock was there to represent the indebtedness, and there was nothing brought to the mind of defendant which would apprise him of any shrinking in the value of the property which he sold to the debtor in the previous March, and nothing to indicate that the debtor was in any way embarrassed—I mean to say in the sense of being unable to realize upon the estate all he owed. The mere fact that a man does not make payments promptly on maturity is not, in itself, sufficient to cast upon any one the onus of a knowledge that the debtor is insolvent.

There is no doubt there was an understanding when h

as, if necessary, to be given security no doubt, upon the authorities cited an unregistered chattel mortgage agreement that it shall not be registered from the beginning, that agreed upon between the maker of mortgagee: but, except in the case in which a bona fide agreement a chattel mortgage honestly given solvency and without any intention preference over other creditors. It had a prior agreement, which was on of the fact that carrying it out the credit of the debtor, makes incumbent upon the defendant, and difficult to satisfy, of convincing the take the chattel mortgage he did so and in good faith, and without he was getting an unjust preference to the debtor.

case or not, I think it cannot be that the defendant was aware of such facts when he took the chattel mortgage as against creditors. I think the case which has been cited of Baldocchi v. 5, 8 O. W. R. 705, and which was in the Court, a copy of the judgment of the Court sent to me.

that it would be going a long way to go down in that case is of no avail to the fact that he took the agreement when he sold the goods that he should have, or the fact that the security was given to the credit of the debtor might be destroyed if the existence of such an agreement destroyed the validity of the chattel mortgage under circumstances in the best of judgment in this case it would not have been the real estate mortgage, which is a bilateral. There was no agreement between me that, even if plaintiff succeeds in his mortgage on that ground, it does not destroy the mortgage, which I also find was made without his knowing or having reason to believe that he was insolvent.

I think the action should be dismissed with costs.

I do not base the judgment at all upon any finding that the debtor in giving the chattel mortgage was actuated by any desire to get rid of the danger of a criminal prosecution in respect of the two notes; I do not find that that was a moving cause, but I find that the moving cause was an honest desire to secure the defendant here for the debt, and I am not able to find that the debtor himself appreciated that he was insolvent and unable, eventually, to pay all his charges.

MACMAHON, J.

JUNE 12TH, 1907.

TRIAL.

DAVIES CO. v. WELDON.

*Money Paid—Failure of Consideration—Action to Recover—
Defence of Repayment—Conflicting Evidence—Credibility
—Surrounding Circumstances.*

Action to recover \$800 alleged to have been overpaid to defendant upon a running account between plaintiffs and defendant, and to recover interest thereon.

W. E. Middleton, for plaintiffs.

A. J. Russell Snow, for defendant.

MACMAHON, J.:—Plaintiffs, through their agent T. E. Colwell, commenced purchasing hogs from defendant in July, 1905, and deposited money from time to time to Colwell's credit in the Dominion Bank at Whitby, and Colwell made advances to defendant, as required, sometimes by sending cheques direct to the Dominion Bank at Lindsay, where defendant kept his account, to be credited to him therein, sometimes by cheques payable to defendant's order. The amounts remitted by Colwell were usually considerable, ranging from \$800 to \$2,100, the whole amount totalling \$13,903 the receipt of which defendant did not dispute.

Of the above amount, \$800 was a cheque sent by Colwell on 5th July, 1905, payable to the credit of defendant at the Lindsay bank.

Defendant said this \$800 cheque was sent in consequence of a representation made by him to Colwell that he was shipping some hogs belonging to one Graham, as well as others he had purchased, and required the additional sum to pay Graham; but that Graham being then unable to ship, the matter was overlooked until the first part of August, when Colwell spoke to him over the telephone about the \$800, and

hogs had not materialized, and was overdrawn; that he (defendant) was, and if he (Colwell) would into he would give him back the set at the Maple Leaf hotel in Toronto early part of August, when he said in bank bills. . . .

corroboration of this by two witnesses in summer of 1905 they saw defendant at the hotel mentioned and handing it. After said that a settlement did take place in August, 1905, but that no money of \$1,228.40 was then ascertained for which a cheque was afterwards issued until more than a year after that, when the plaintiff discovered that Colwell had paid \$800 to defendant in his return of a cheque to defendant, although the \$800 was deposited in the Dominion Bank at Whitby against the evidence and correspondence are set forth in the judgment. The learned Judge pro-

ceeded to state that through an oversight the cheque was not transferred from his account and was therefore not taken into account in his judgment of August and 13th September, 1905. He then stated the surrounding circumstances, and I prefer to credit those and the evidence reaching a conclusion rather than the evidence of the witnesses he called. He then awarded judgment for plaintiffs for \$800 with interest, 1906, and costs of suit.

JUNE 13TH, 1907.

WEEKLY COURT.

RE MORTON.

*Estate during Widowhood—No Devise
in Fee Subject to Bequests in the
will.*

Now of George Sherry Morton, deceased,
asking certain questions arising upon the
will.

C. J. Holman, K.C., for Susannah Morton, widow.

W. H. Blake, K.C., for Phœbe Holbert and Mark Morton, brother and sister of testator.

S. Masson, Belleville, for other brothers and sisters of testator.

FALCONBRIDGE, C.J.:—The following is the will:—

“First, I hereby will that William Henry Morton, of the township of Huntingdon, be my sole executor.

“Second, I will and bequeath all the property of which I am possessed, both real and personal, to my wife Susannah Morton, for her sole use and benefit so long as she remains my widow, but in the event of her marrying again then I will that my sister Phœbe Holbert be paid from my estate

sole penalty which he imposed upon her in the event of her marrying again was to pay these two sums. If the testator had intended any further or other diminution of the provision which he made for the widow, he would, no doubt, have made a direction as to whether Phœbe Holbert and Mark Morton should take the \$500 each in addition to their distributive share as on an intestacy.

The nearest authority to which I have been referred is *In re Mumby*, 8 O. L. R. 286, 4 O. W. R. 10. It is not exactly in point, but it is to some extent on the same lines.

The answer will, therefore, be that she is entitled to the fee simple in the land, and an absolute interest in the personality, subject only to the before-mentioned payments in the event of her re-marrying. This judgment renders it unnecessary to answer the other questions. As I think that the point was quite arguable, I must give costs to all parties out of the estate, even though that means costs payable by the widow.

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TO, JUNE 27, 1907.

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JUNE 14TH, 1907.

WEEKLY COURT.

NEWBIGGING.

*of Real and Personal Property to
then to Heirs"—Fee Simple—Abso-
lutely—Rule in Shelley's Case.*

or of the will of John Newbigging,
order determining a question aris-
ing of the will.

, for executor.

and Newbigging.

onto Junction, for widow.

infants.

tator died on 10th March, 1895,
Ellen Newbigging, his widow, and
will contains the following clause:
"I bequeath all messuages, lands, tene-
ments, and all my household furniture,
or money, goods and chattels, and
personal estate and effects whatsoever
my beloved wife Ellen Newbigging,
administrators, and assigns, to and for
her benefit during her natural life

for a construction of the will and
whether the widow takes a life

right, if any, is in the previous owner: *Partridge v. Great Western R. W. Co.*, 9 C. P. 97; *Re Prittie and City of Toronto*, 19 A. R. 503, 522; *Regina v. McCurdy*, 2 Ex. C. R. 311.

Somewhat different considerations apply to the other branch of the case. Certain water is brought down by the work, for which defendants are at least in part responsible. This, through the drain being allowed to be partly filled with sand, goes in part upon the plaintiff's land. Had any damage been proved or found, as at present advised I think an injunction might well be granted against the continuance of this state of affairs; and the fact of Bayham being jointly charged with the road would not prevent such injunction being granted against the present defendants. But the jury have negatived damage; and practically the only reason why an injunction could be asked for under such circumstances is that the continuance of the wrong might ultimately turn it into a right, through the operation of the Statutes of Limitations.

Counsel for defendants undertakes that the plea of the Statute of Limitations will not be set up in any action or other proceeding to be taken at any time hereafter; such undertaking may be inserted in the judgment, and with this undertaking the appeal should be allowed with costs, and the action dismissed with costs, without prejudice to any action or other proceeding to be taken against either township or both for any future wrong.

JUNE 18TH, 1907.

DIVISIONAL COURT.

RUETHEL MINING CO v. THORPE.

Company—Directors—Sale of Mining Properties to Company—Acquisition by Director—Agent or Trustee for Company—Secret Profits—Affirmance of Contract by Company—Return of Notes and Shares—Costs.

Appeal by plaintiffs from judgment of ANGLIN, J., 9 O. W. R. 942, dismissing the action as against defendant Thorpe.

A. St. G. Ellis, Windsor, for plaintiffs.

A. H. Clarke, K.C., for defendant Thorpe.

ONBRIDGE, C.J., BRITTON, J., RID-
appeal with costs.

JUNE 19TH, 1907.

TRIAL.

LEY v. BRADLEY.

*Option to Purchase Land—Person
ing Land for Sale by Auction—Ven-
ioneer not to Proceed—Refusal of Auc-
of Resale—Action for Damages—Loss
n of Time—Right to Chattels.*

Bradley against Thomas P. Bradley,
W. A. F. Campbell, to recover dam-
etc.

in an action for the administration
Bradley, deceased, in which action
Bradley was plaintiff and defendant
ners were defendants, an agreement
1906, was arrived at between the
f that action, whereby, inter alia,
on to purchase a farm there in ques-
share in the estate, fixed at \$1,200,
eks from the date of the agreement
ase; that plaintiff, relying on the
greement on 22nd September, 1906,
uxton for \$13,500, but on the under-
as to have the privilege of advertis-
for sale by public auction in order
price could be obtained therefor;
the farm for sale by public auction
at on 1st October, 1906, defendant
instructions from his co-defendants,
tioneer notifying him that plaintiff
e farm for sale; that in consequence
ioneer refused to offer the property
refused to carry out his agreement;
e to obtain another purchaser, and
se; that defendants wrote or caused

the letter to be written and delivered purposely to do plaintiff damage and cause him loss; and that defendants had agreed to deliver to plaintiff certain goods upon the farm (describing them) but had refused to do so. Plaintiff claimed \$6,000 damages for the wrongs complained of, and \$500 damages for the detention of the chattels.

The action was tried without a jury at Brampton and Toronto.

W. S. Morphy, Brampton, for plaintiff.

w. J. Hanna, Sarnia, for defendants Thomas P. Bradley and Isabella Bradley.

E. G. Graham, Brampton, for defendant Campbell.

BOYD, C.:—There appears to be no actionable wrong in the matter of the complaint preferred by plaintiff. His duty was plain under the terms of settlement, by which former litigation was ended. He was given the privilege of purchasing the homestead for the cash price of \$12,000, less his share of the estate, fixed at \$1,200, and was to carry out the purchase within two weeks from the date. Therein he failed; he had not the money in hand, and he failed to raise it, so that default in payment happened, and his right to get the property ended.

The only excuse for this failure to observe the strict letter of the offer was that he proposed to make a sale of property, which was frustrated by a letter from the solicitor defendant to the auctioneer. Upon the receipt of the letter the auctioneer declined to go on, and this failure to hold the auction was made the occasion of the withdrawal of one Luxton, who proposed to buy at plaintiff's right to the property for \$13,500. This proposed sale appears to me a matter altogether collateral to the transaction between plaintiff and the estate. What scheme he might try in order to raise the money is foreign to the purpose, so long as he failed to make the payment in time. He was not prevented from paying the money on the day, and he could then, had he wished, subsequently have proceeded with the sale to make profit out of his bargain. But till he paid his money there was no contract between the parties, and nothing out of which a right to damages would arise from the breach of it: *Ranelagh v. Miller*, 2 Dr. & Sm. 278; *Dawson v. Dawson*,

Collins, 5 N. R. 345; Brock v. Garrod,

think the solicitor rightly objected to
f to sell the homestead as if he were
the utmost he could properly offer for
option."

l should be dismissed with costs.

nattels (not those mentioned in the
plaintiff, which defendants do not ob-
the farm. The list of these can be
after hearing the parties, and order
iff to possess himself of them within

JUNE 10TH, 1907.

CHAMBERS.

CO. v. COBALT LAKE MINING
CO.

*Action to Recover Possession of Min-
Provincial Legislature Passed Pendent
of Defendants—Petition for Disallow
Postponement.*

from order of Master in Chambers,
motion to postpone or stay the trial

ame before MULOCK, C.J., who ad-
ore the trial Judge.

oy BRITTON, J., at the Toronto non-
ore the case was reached upon the
Chambers appeal.

for plaintiffs.
defendants.

d the appeal, and postponed the trial
ury sittings, beginning in September,
ants in any event.

BOYD, C.

JUNE 21ST, 1907.

WEEKLY COURT.

RE SOLICITOR.

Solicitor — Contract with Client — Share in Fruits of Litigation — Illegal Bargain — Champerty—Contract to Pay Further Sum if Verdict Sustained on Appeal—Taxation of Bill—Deduction of Sums in Addition to Costs from Amount Recovered — Unprofessional Conduct — Intervention of Law Society.

Appeal by client from report of local registrar at Picton upon the taxation of a bill of costs rendered by the solicitor to the client.

M. Wright, Belleville, for appellant.

W. E. Middleton, for solicitor.

BOYD, C.:—I now consider the two main items in appeal: the first, \$625, being an amount equal to 25 per cent. of judgment in an action by the client against the Standard Ideal Co. for damages for a personal injury sustained by him; the second being \$200 which the client was to pay the solicitor if the verdict was sustained on appeal.

The client signed agreements of December, 1905, and May, 1906, touching these amounts. An action was successfully brought and judgment obtained for \$2,600, and the appeal was decided in favour of the client. The solicitor obtained his taxed costs from the other side, and has also rendered a bill for solicitor and client costs, claiming over \$200 of additional costs which have been allowed by the local registrar at Picton. The officer allowed the two large items on the ground that they had been paid and the matter was not further examinable. Had the client made the payments, I do not think it would have mattered, but in fact there was no payment by the client. The solicitor received all the fruits of the judgment, and retained those amounts in satisfaction of his claims. Both items must be disallowed, but on different grounds.

The confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by

justice of the Courts. Especially does it seem an element for the lawyer to share in the claim, as compensation for his service is in contravention of the statute and it is also a violation of the solemn promise made by the barrister upon his call.

The agreement first made is that the solicitor in a joint speculation to be prosecuted for their joint advantage—the client and the lawyer contribute to the expenses. When the professional man becomes a partner, instead of an independent adviser, temptations to secure success by unethical means need not dwell on the ethical aspect; the lawyer's action is contrary to the law and the duties of office.

The laxity of opinion, and perhaps of the observance of a high standard of conduct in the struggle of modern life, but while it is true that as it is practitioners must not be without with impunity the safeguards which protect the public of society. True it is that in some, in neighbouring States it is permissible to conduct cases on the footing that many eminent lawyers lament the state in which it involves. One who was in the New York Court spoke at a recent bar association of the fatal and pernicious change made by statute by which lawyers and clients may make any agreement they please as to contingent fees, contracts for the lawyer to pay all the expenses and take all the profits. . . . And at an earlier time tersely put by Webster: "I never saw a lawyer merely, for that would make me a lawyer."

From bad to worse on the downward slope of the American "ambulance-chaser" has been the so-called professional life. His function is to injure sufferers, with shameless selfishness, interview jurymen, compass in the verdict, and enjoy some generous compensation ready in more than one State statutes

have been passed to put an end, if possible, to such disgraceful practices. It is well then in Ontario to repress the beginnings of anything savouring of this kind of illicit procedure. To this end, I think that the circumstances of the case should be investigated and dealt with by the Law Society upon notice to the solicitor.

The plea is put forward that this client was badly injured and without means or friends to conduct litigation in the usual way. Granted that it was a case of charity and one proper to be brought into Court. The solicitor might well have undertaken the case as a matter of professional beneficence and have acted honourably and creditably. . . . If he could only intervene on the terms of sharing in the verdict, then, so far, from being of charitable import, he would implicate his client in a criminal transaction.

The true method of dealing with impoverished clients is laid down by Lord Russell of Killowen in a charge to the jury in *Ladd v. London, etc., R. Co.* (March, 1900), 110 L. T. Jo. 80, . . . approved by the Court of Appeal in *Rich v. Cork*, ib. 94.

With a view of inviting professional or legislative action which might tend to meet the recognized difficulty of injuries and wrong suffered by poor and helpless people, I may refer to a suggestion long ago made by Mr. Joseph Chitty, which has not, I think, as yet fully fructified in any practical outcome. He says: "Perhaps a power, by leave of a Judge, to permit an attorney to stipulate for remuneration in difficult and doubtful cases might safely be introduced; such a stipulation would prevent the hard bargains which are secretly made in consequence of the risk incurred, and constitute a protection to needy persons who have claims which they wish to assert, and yet are not so impoverished as to be able to sue in *forma pauperis*. Such a power might be so qualified as to prevent any risk of maintenance or champerty:" Chitty's *Practice of the Law*, vol. 2, p. 28.

The second item, \$200, is disposed of on the principle enunciated by the late Vice-Chancellor Mowat in *Re Geddes and Wilson*, 2 Ch. Ch. 477. It is not open for a solicitor during the progress of a case to call upon his client to pay a round sum or any sum (other than for costs) before he will go on. It is a sort of stand-and-deliver outrage which the Court will not sanction or allow to stand, when once attention is called to it. The solicitor must account for

to his client, after the payment of
 ted to, for journeys and extra fees
 idered and taxed by Mr. Thom.
 pay the costs of appeal up to this
 reference reserved.

JUNE 21ST, 1907.

TRIAL.

MAN v. FRASER.

*Contract for Sale of Land—Specific
 king of Purchaser to Build—Condi-
 Acts of Agent of Vendor—Waiver—
 on of Cheque for Part of Purchase
 ing Payments—Time of the Essence
 er of Formal Agreement for Execu-*

formance of an agreement for sale
 plaintiff.

plaintiff.

defendant.

agreement in question in this action
 e part of plaintiff to purchase from
 on the south side of Bloor street,
 described in the offer dated 2nd
 sum of \$2,775, which offer was
 n 4th February, 1907. The offer
 . McTaggart & Co., as agents for
 the acceptance by defendant is in
 cept the above offer and its terms,
 nd agree to and with the said F.
 ry out the same, on the terms and
 ed, and I also agree with the said
 usual commission."

Plaintiff seemed willing and anxious all along to carry out his part of this agreement. Defendant resists, upon the following grounds . . . :—

1. Plaintiff was to give defendant a written undertaking that he, plaintiff, would commence to build houses on this land before 15th April, 1907, and that without that defendant would not have entered into the contract.

2. The payments of \$25 and \$275 mentioned in the offer were not made within the time limited.

3. Time of the essence, and plaintiff did not do his part within the time.

4. No formal agreement tendered within the time limited.

I am of opinion that the written undertaking which it is alleged was to be given by plaintiff as to when he would commence building on the lot in question was no part of the agreement for sale, and that the agreement for sale was in no way affected by it. It was not made a part of the agreement for sale. The handing over the offer and acceptance to plaintiff must be considered as the act of defendant.

In the beginning of this transaction Douglas Ponton was acting as agent of defendant for sale of this property, and McTaggart was a sub-agent. He was in the real estate business, looking for buyers and sellers and acting wherever he could get a commission. He received plaintiff's offer, using his own carefully prepared office form for the purpose. That offer was in terms an agreement with defendant through W. O. McTaggart & Co., as agents, to purchase the property in question. Having received the offer, McTaggart and Ponton went together . . . to defendant on 4th February, when defendant accepted in writing plaintiff's offer, accepting it upon the same document as the offer, and agreeing to pay the commission of the agent McTaggart. Defendant then told Ponton and McTaggart that he would not sell unless he got an agreement from plaintiff that he, plaintiff, would commence to build on the property not later than 15th April. Apparently, upon his own statement, defendant would have been satisfied with a letter from plaintiff to that effect. Ponton says that McTaggart was not to hand plaintiff the agreement to sell until he (McTaggart) got plaintiff's letter. On 5th February McTaggart saw plaintiff, obtained a letter (exhibit 3) from him, and handed the agreement to him. This letter is not in terms such as defendant says he required, but McTaggart accepted it, and

received \$25 from plaintiff, and then
or \$25 to Ponton, the general or
for carrying out this transaction.
was duly indorsed by Ponton and
was retained by defendant until
was returned under the circum-
stances.

In his possession, I must hold that
of defendant, and not the agent
that this is against plaintiff's
discovery. I do not
McTaggart, as coming from defendant,
to put in the offer, and plaintiff
action would be carried out by Mc-
McTaggart was acting for plain-
cannot alter the facts of how Mc-
transaction and as to what defendant
Then McTaggart says he was in
in this sale by defendant. Mc-
bound defendant by any change in
to title, price, or terms of pay-
he held the actual agreement of
such a letter from plaintiff as he,
be satisfactory, and then deliv-
think defendant is bound by this,
needed only a special or particular

ing this case within the rule that
been entered into upon the repre-
that he will do something material
under it, and he does not make
he cannot enforce specific perform-
do not think his case is within
representations by plaintiff that
his letter (exhibit 3) is what plain-
agreement. If McTaggart repre-
d give such a letter as plaintiff
binding upon plaintiff, and further
so worded as plaintiff asked for
al to defendant's interest than the
ain, I am of the opinion that de-
McTaggart's cheque indorsed to him
condition as to letter, if any such

The other objections may be considered together. It appears plain upon the evidence that defendant regretted the bargain and desired to get out of it. He could get, I think, and as he ascertained, a larger sum for this property than plaintiff was to pay, and so not from any fear that plaintiff would not be able to pay, or would not pay, but to get rid of plaintiff, defendant has attempted to create difficulties and sought for reasons for not carrying out the sale. . . .

[Reference to *Green v. Sevin*, 13 Ch. D., 601, 602.]

In this case, as I view the evidence, the Court ought not to lend its assistance to defendant so that upon any mere technicality or legal refinement plaintiff will not get the benefit of a purchase he made, and has fairly and honestly attempted to carry out.

If upon settled principles of law the facts entitle defendant to succeed, of course he must do so, no matter how great the hardship upon plaintiff or how much the pecuniary advantage may be to defendant. . . .

The offer itself provides that it must be accepted by 4th February, 1907, or otherwise be void. The sale was to be completed on or before 15th February, on which date possession of the premises was to be given to plaintiff. And then the agreement provides that "time shall be the essence of this offer." If the offer was not accepted by 4th February plaintiff was not to be bound, but it was accepted by 4th February. By defendant's acceptance of that offer, the clause of time being of the essence was not brought into play in favour of defendant. It made the agreement just as an agreement for a sale by him to plaintiff, if plaintiff ready on his part to complete on or before 15th February, 1907. Before 15th February the matter was placed by plaintiff in the hands of E. G. Morris, as his solicitor, to complete the purchase.

I accept the evidence as establishing that on 14th February defendant said to Morris that he, defendant, had heard that plaintiff had sold part of the property, and that he, defendant, would not close until he had seen the agreement; that on 15th February defendant saw the agreement and made no objection to it, but said he would not pay agent's commission, and that he wanted to see agent, and further that plaintiff would not suffer loss, as he would make it right with him, or words to that effect. Defendant also said to plaintiff's solicitor on 15th February that

that evening. Defendant did not complain of plaintiff's not giving mentioned, or refer to that letter or

solicitor sent to defendant an action Bank for \$275 enclosed in a returned unopened, and the solicitor was addressed to defendant, and is for Street Property to Bowerman:— "With my marked cheque for \$275, I have paid you the day on property on Bloor street from you. I further beg to be called at my office after you had advised me that he had sold a portion expected to be able to pay you the next 30 days. Under the circumstance that the deed be prepared, instead of that, and I shall advise you at once the money will be paid over."

On 6th February defendant wrote to Bowerman: "Re Sale Bloor Street Property. Your letter received this morning enclosing being part of the money payable to me. This cheque I refuse to receive, not being a legal tender, and the payment under the agreement. I have no objection for sale and return the said cheque for \$25 which was handed to me in the presence of W. O. McTaggart, your agent, and your client."

Defendant complains of the absence of a letter commanding building or commencing to build.

On Saturday. On the Monday following, the solicitor formally tendered cash and an agreement such as was made and acceptance, but defendant refused to execute the agreement. He refused the agreement, and would fight it if commenced; the writ issued on

When time was made of the essence of the offer was accepted and the agreement the offer was not accepted by the

4th it was to be void, but, once accepted in time, it became an agreement for sale to be completed as a formal binding agreement for sale on or before 15th February, on which date, plaintiff doing his part, he was to get possession. This agreement does not do more than give defendant the right to rescind by fixing a reasonable time to bring the bargain to an end, then that need not be considered. No such time was given. As a matter of fact plaintiff was prompt in the performance of the obligation devolving upon him, never declared his inability or unwillingness, and did not ask for any indulgence or extension of time. There was not, in my opinion, any suspicion on the part of defendant of plaintiff's inability to carry out his purchase. I find that plaintiff was able and willing to carry out the agreement.

If time was expressly made of the essence of this agreement, I think that was waived, and that defendant, by reason of his dealing with plaintiff's solicitor on 14th and 15th February, should not be allowed to set it up as a defence in this action.

As to tender, the objection to the form of it, apart from the time when made, which I have dealt with, ought not to prevail. It was apparent from the facts and circumstances that the money would be refused—that was defendant's attitude. He positively refused to carry out his agreement. He said it was rescinded, and announced his determination to fight it out, so tender before bringing the action was unnecessary.

Judgment for plaintiff for specific performance as prayed, in case defendant can make a good title. Reference to Master in Ordinary to inquire and state whether a good title can be made, and in case a good title can be made to take account of the purchase money, and tax plaintiff his costs, and deduct from amount bound due for purchase money, and appoint time and place for payment of balance one month after making his report, and defendant upon such payment to convey to plaintiff, or to whom he may appoint in accordance with conveyance to be settled by Master in case parties differ. But in case plaintiff shall make default in payment of balance of purchase money as the Master shall appoint, the contract will be rescinded and the action dismissed, and in that event defendant to pay plaintiff's costs of action up to judgment, and plaintiff to pay defendant's subsequent costs, the same to be set off

paid by the party found liable there-
 use the Master finds that defendant
 e, the Master is to inquire and state
 as sustained by reason of the breach
 , and defendant is to pay to plaintiff
 with costs of action and reference.

JUNE 21ST, 1907.

TRIAL.

SIDE v. WEBB.

Voluntary Submission to Arbitration
ent Varying Submission not Equiva-
tion—Arbitration Act—Award made
—Failure of Arbitrators to Extend—
—Dismissal of Action to Enforce.

d made on 26th July, 1906.

r plaintiffs.
 defendant.

he plaintiffs are wholesale merchants
 defendant is a builder and contractor

contracted to build for the plaintiffs
 reet, in the city of Toronto, which
 o the terms of the contract.
 d that the defendant had been over-
 ant alleged that the plaintiffs still
 im.

1905, the parties entered into an
 Acton Bond and Charles J. Gibson,
 nvolved in the erection of the ware-
 submission "to find the exact cash
 ering into the construction of the
 ng, both as to material and labour,
 ut the actual cash cost is to be the
 th no profit whatever included, and
 an addition of 10 per cent. is to be
 ractor's profit, the said 10 per cent.

to include architect's and draughtsman's fees to be paid out of the said 10 per cent. by the said John E. Webb."

The submission also provides that the said Bond and Gibson shall, before entering on their duties, mutually agree upon a third person who will, in the event of a failure on the part of said Bond and Gibson to agree, "act as umpire to decide any or all of such matters."

Webb, by the terms of the submission, agreed to furnish all necessary information in regard to the actual cash cost of all material or labour entering into the cost of the building.

H. B. Gordon, an architect, was duly appointed umpire.

The plaintiffs evidently thought that Mr. Bond was not aware of his appointment as arbitrator, for on 4th December they wrote him enclosing a copy of the submission, and urging him to fix a time for proceeding with the arbitration as Mr. Garside was desirous of leaving the city.

Mr. Bond was nominated as an arbitrator by the defendant.

On 30th December Garside wrote Bond stating that he had just learned that nothing had been done by the arbitrators, and asking Bond as a personal favour to see that the arbitration be proceeded with the first few days of the new year. Mr. Garside mentioned that he was writing Mr. Gibson to co-operate in this.

Gibson was written to on the same day in like terms.

The arbitrators considered the requests in the letters to them to take up the work of the arbitration as "notice calling upon them to act," and they did act, for on 9th January, 1906, Gibson wrote the plaintiffs: "I telephoned Mr. Bond this morning, reclosing up our valuation, and he informed me that since our last meeting he has had other communications which throw a new light on the agreement to him. He has apparently consulted his solicitor as to the meaning of the agreement, and his solicitor has written him a letter, which he sent to me to-day, and of which I enclose you a copy. As I understand it, Webb's claim under the agreement is for the exact cash cost of his work, and not a valuation. Of course we understand from the agreement that Mr. Bond and myself are to ascertain the cash cost, but, in the absence of any accounts, vouchers, or papers from Webb, we assume that the cash cost is not ascertainable."

from Mr. Bond this morning that he
se vouchers or papers from Webb.”
mentioned valuation had been made, it
me aware that it was not made in
ms of the submission, but, in order
e point, he wrote Messrs. DuVernet,
union, which was sent Bond on 8th
ows: “We have considered the en-
t which you handed us. We under-
tends that you and the other arbi-
count that it cost Mr. Webb to erect
Messrs. Garside & White contend that
material and labour, regardless of what
paid for it. We do not think the
e contention of Messrs. Garside &
e especially that the clause at the
provides that Mr. Webb will give
o the cost of material and labour.
et in inserting this provision if the
ment had been to merely make a
nd should have been done without
Webb.”

is opinion, on 18th January, 1906,
r seal was executed by the parties,
e former submission, and is as fol-
when J. E. Webb furnishes evidence
ators as to the actual cash cost re-
ement, the finding of the arbitra-
eon, and that the arbitrators may
and make a valuation in all cases
satisfies them is not produced; and
s agreed that all evidence which J.
e or produce to the arbitrators on
sh cost must be given by 31st Janu-
date the arbitrators may proceed
J. E. Webb is not able to give any
ve their decision accordingly, and
further evidence shall be received
within agreement is to be read as
he above provisions.”

ppointed third arbitrator on 30th

on of this supplemental agreement
Mr. Bond wrote defendant saying:

"As joint arbitrators, Mr. Gibson and myself would like you to send us a detailed statement giving your cash outlay on the Garside & White building. Please send this in such a form that we can check it with all necessary vouchers," etc.

The plaintiffs' contention is that the supplemental agreement of 18th January forms a new submission.

As early as 1804, in *Evans v. Thompson*, 5 East 189, where the parties, by an indorsement, in general terms, on a submission to arbitration, had agreed that the time for making the award should be enlarged, Lord Ellenborough C.J., after consultation with all the Judges, said that such agreement virtually included all the terms of the original submission to which it had reference. . . . [*Watkinson v. Phillpotts*, *McClell. & Y.* 393, and *Bullock v. Koon*, *Wendell* 53, also referred to.]

In the case in hand proceedings had commenced under the first agreement prior to 9th January, 1906, and in the supplemental agreement the time for making the award was not enlarged. It, however, provides for the furnishing to the arbitrators by Webb of evidence of the actual cash cost of all material and labour, etc. This is included in the first agreement, and Mr. Bond, on being advised by Messrs. DuVernet, Jones, & Co. of its existence in the original agreement, wrote Webb, three days before the second agreement was executed, to furnish the required information. The only provision in the second agreement which is new is the limitation of the time within which the defendant is to furnish the arbitrators with the evidence of the cash cost of materials, etc., failing which they are empowered to proceed and exercise their own judgment in making a valuation. It then provides that "the within agreement" (the one of 11th November, 1905) "is to be read as though it contained all the above provisions." That is, the second agreement is to be read into and form part of the first agreement.

I am, therefore, of the opinion that the agreement of 18th January did not constitute a new submission.

It follows, if my view is correct, that it was not necessary to re-appoint the umpire after the execution of the supplemental agreement.

No provision is made in the submission as to the time within which the arbitrators are to make their award, that, by the provisions of the Arbitration Act, R. S. O. 1897, ch. 62, sec. 4, clause C. to schedule A., shall be deemed to be included therein, under which the arbitrators are

within three months "after entering on or being called on to act by notice in writing to the submission, or on or before which the arbitrators by writing may make the award."

It did not extend the time for making the award, if they had done so, this litigation would have

been made on 30th July, 1906, by which the actual cash cost of the warehouse was added 10 per cent., as provided, making a total of \$16,648.50.

It had been paid to the defendant \$20,813.33, and the award were to stand, be \$4,164.83 com-

puted and not made until 6 months after the award was made, and he was directed to proceed with the reference,

and judgment for the defendant dismissing

JUNE 21ST, 1907.

TRIAL.

ERIN v. COUNTY OF WELLINGTON.

Issues — Liability for Maintenance of Bridge or Culvert—Definition of Cul-

Under sec. 617 of the Municipal Act, it was found that the two counties were liable for the maintenance of what was alleged to be a dam crossing the boundary line between the County of Dufferin and the other in Well-

ington, for plaintiffs.

for defendants.

J.:—It is not a case for a declaratory judgment as to any other structure, as each particu-

lar one would have to depend upon its own conditions, and I am dealing only with the particular case which has been brought before me.

It is contended by defendants that the structure is not a bridge, but only a culvert. It is a circular concrete pipe with an inside diameter of 3 feet. The concrete is 6 inches thick, and there is about a foot of gravel on the top of the pipe. It replaced an old bridge about 8 or 10 feet in span, which had fallen into disrepair.

The dernier cri of dictionary-making in our language is being issued from the Clarendon Press, Oxford, and edited by Dr. James A. H. Murray. From it I take the following article:—

“Culvert—a recent word of obscure origin. It has been conjectured to be a corruption of *F. couloir*, a channel, gutter, or any such hollow, along which melted things are to run, *f. couler* to flow. But points of connexion between the *Fr.* and *Eng.* words, in form and sense, are wanting. On the other hand, some think ‘culvert’ an *Eng.* dialect word, taken into technical use at the epoch of canal-making. No connexion with covert has been traced.

“A channel, conduit, or tunnelled drain of masonry or brick-work conveying a stream of water across beneath a canal, railway embankment, or road; also applied to an arched or barrel-shaped drain or sewer.

“Used from c. 1770 in connexion with canal construction; thence extended to railways, highways, town-drainage, etc. In connexion with railways and highways, it is sometimes disputed whether a particular structure is a ‘culvert’ or a ‘bridge.’ The essential purpose of a bridge, however, is to carry a road at a desired height over a river, and its channel, a chasm, or the like; that of a culvert to afford a passage for a small crossing stream under the embankment of a railway or highway, or beneath a road where the configuration of the surface does not require a bridge. Locally, the term ‘culvert’ is often limited to a barrel drain, bricks shaped for which are known as culvert-bricks.”

When the above is read in connection with the case of *Township of North Dorchester v. County of Middlesex*, 16 O. R. 658, it is manifest that this particular structure is a “culvert” and not a “bridge.” That case was decided in 1889, and since that time the section of the Act (then sec. 535 of ch. 184, R. S. O. 1887) has been amended by the insertion, after “rivers,” of the words “streams, ponds, or

see that this advances the case at all
ffs. The most particular evidence as
ater which the culvert carries is that
owman, C.E., who visited the place
e the trial. There were then about
bout two feet wide, running through.
the ditch, and it is an artificial chan-

Some of the water came from a
to the swamp, and he says it is con-
e county of Wellington. The spring
gone through, and he would not be
dry in July and August.

a view of my opinion upon this part
r whether the plaintiffs' remedy, if
e been by arbitration. There was a
olved in this case (\$47.50), but the
inging the action in the High Court
o try and get the affirmation of some
overn in like cases.

Dismissed with costs.

JUNE 21ST, 1907.

VISIONAL COURT.

TERHOUT v. FOX.

*nt Recovered—Ascertainment—Coven-
under — Annuity—Deduction—Pay-
vision Court Jurisdiction.*

from order of TEETZEL, J., ante 157,
defendants from a ruling of a local
ecting that plaintiff's costs of the
on the Division Court scale.

ed by FALCONBRIDGE, C.J., BRITTON,

laintiff.

defendants.

RIDDELL, J.:—The action was to recover arrears of certain fixed annual sums payable by defendants to plaintiff "annually during the time of his actual life."

The defence set up satisfaction by way of novation and payment. The trial Judge (Anglin) held that the defence of novation had not been made out, and that there was due and payable to plaintiff from defendants, as arrears of the annuity, \$37.50 a year for 7 years, a total of \$262.50. The amount of annual payment was fixed at \$100 in the deed, but defendants contended that of this \$100 plaintiff had agreed to look to another person for \$37.50—defendants admittedly paying the balance, \$62.50 per annum. It appeared that defendants had paid to one Dunnett, a creditor of plaintiff, "whom they had not in any way undertaken to pay as part of the bargain," the sum of \$69, at the request of plaintiff; and the trial Judge said: "But against that"—i.e., the sum of \$262.50—"must be offset the sum of \$69, which I find was paid by defendants. . . . to one Dunnett. . . . Deducting this sum leaves a balance of \$193.50, for which judgment must be awarded for plaintiff with costs."

No direction was given as to the scale of costs. The taxing officer at Belleville held that the costs should be taxed on the County Court scale; my brother Teetzel reversed the officer's ruling and held that the action could have been brought in the Division Court. . . .

The governing statute is the Division Courts Act, R. S. O. 1897 ch. 60, sec. 72 (1) (d), as amended by 4 Edw. VII. ch. 12, sec. 1:—"The Division Courts shall have jurisdiction in the following cases . . . (d) All claims for the recovery of a debt or money demand the amount or balance of which does not exceed \$200, where the amount or the original amount of the claim is ascertained by the signature of the defendant. . . ."

"72 (a). The amount or original amount of the claim shall not be deemed to be ascertained by the signature of the defendant . . . when in order to establish the claim of the plaintiff, or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it."

The objections to the jurisdiction of the Division Courts are two, one based on the original section, viz., that the amount or balance recoverable is more than \$200, and the

ent of 1904 (putting an end as it
h existed in the Courts as to the
ds of the original section), i.e., that
required by plaintiff to establish
d in the amending section.

by defendants that the agreement
that defendants should pay only
that they had actually paid all they
to pay, makes it clear that the \$69
be and was not considered a pay-
nnuity.

ot may occur whether a particular
payment or a set-off, but in general
the two is quite plain. A payment
able in reduction of the particular
made; that demand is therefore re-
he payment. To constitute a pay-
st have the assent of both parties,
o action is maintainable; while a
l independent demand which one
er, and in respect of which he is as
her as that other is of him, and for
maintain a separate action as his
nd." In re Miron v. McCabe, 4 P.R.

In that case plaintiff sued on an
\$36.55, giving credit for \$169.07½,
\$169.07½ was included the sum of
endant on account. A sum of \$42
nt to one G. upon the written order
plaintiff swore at the trial that had
t of this sum his claim would have

The learned Judge held that the
he does not hold that the \$42 was a
account the defendant had against
as a payment. He does not in so
her is not a payment, but he goes
(\$13.92) is, I presume, a set-off, but,
deration, there is the full claim of
ents amounting to \$155.15, leaving
t or account of \$81.40 and so not
vision Court had, therefore, clearly
."

een a payment and a set-off is, I
definition of Wilson, J.

The decision in this case was overruled in *In re Hall v. Curtain*, 28 U. C. R. 533, and *In re Judge of the County Court of Northumberland and Durham*, 19 C. P. 299; the effect of these decisions, however, is not at all to question the accuracy of the definition by the learned Judge, but to make it even more clear that a claim cannot be reduced by allowing a set-off to the defendant, unless there has been an agreement between the parties to set off one claim against the other in whole or pro tanto. See also *Furnival v. Saunders*, 26 U. C. R. 119; *Re Jenkins v. Miller*, 10 P. R. 95.

In this case the payment to Dunnett entitled the defendant to a set-off or counterclaim — it is immaterial to consider which — and the plaintiff was not entitled by giving credit for this sum to bring his action in the Division Court. In this view it is unnecessary to consider the second ground taken (for the first time before us), viz., that the plaintiff's claim being for an annuity during his life, the fact that he was alive must be proved. As at present advised, I do not think that there is any presumption that, because an action is brought in the name of a person who under a deed is said to be entitled to a life annuity, that person is or was at any particular time alive. I am not, of course, speaking of a case in which the action is brought shortly after the making of the deed. There, there may be a presumption that the annuitant was alive, or at least believed to be alive at the time the deed was made, and it may probably be presumed that he continues to live. But here the deed is made in 1892, and the action brought 13½ years later. I fail to see that there is any presumption that the grantee was alive, say, in the year 1905, unless the fact that an action is brought in his name raises such a presumption, and that, I think, it does not. It is not without precedent that an action should be brought in the name of a person long dead. And it is no answer that in the defence it is admitted that "the plaintiff is a retired farmer residing in the township of Murray." The plaintiff was not bound to anticipate that this would be admitted.

I am of opinion that the appeal should be allowed with costs both in this Court and below, and that the ruling of the taxing officer at Belleville should be restored.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

THE
WEEKLY REPORTER

TO, JULY 11, 1907.

No. 7

JUNE 24TH, 1907.

CHAMBERS.

AND UNION TRUST CO.

*Jurisdiction—Removal of Arbitrator—
Reference of Motion to Judge in*

Under the Arbitration Act, R. S. O.
as amended by 6 Edw. VII. ch. 19,
naming an architect as arbitrator or

applicant.

Company, shewed cause, and objected
to the jurisdiction in the Master in Chambers

consideration of the sec. 2 of the
Act of opinion that this objection must

I was to hold that this was so, I
referred to a Judge in Chambers.

Now, it does not seem that I can even
interfere in any proceeding in the High

Justices will consent to this being done;
it must be dismissed with costs fixed at

CARTWRIGHT, MASTER.

JUNE 24TH, 1907.

CHAMBERS.

WALLACE v. MUNN.

Costs—Motion for Leave to Discontinue without Costs—Payment of Plaintiff's Money Claim—Injunction—Rule 430 (4).

Motion by plaintiff under Rule 430 (4) for leave to discontinue as against the original defendants without costs.

Grayson Smith, for plaintiff.

W. Laidlaw, K.C., for defendants.

THE MASTER:—The action began on 11th February, 1907. It arises out of a lumber transaction. The writ of summons was indorsed with a claim for payment of near \$3,000, and an injunction restraining the defendants from taking lumber from the limits in question. On 10th April an order was made dissolving the interim injunction, and allowing the plaintiff to amend by adding the Echo Bay Lumber Company as defendants. The statement of claim was delivered on 2nd May. In this payment was asked from the lumber company, and an injunction as against the defendants.

On 13th May the Munns delivered their statement of defence, in the 8th paragraph of which they deny any right of action in the plaintiff as against them.

On 18th May plaintiff received payment in full of the amount claimed, and now says he has no further reason for continuing the action. Such payment was presumably made by the lumber company, and now the present motion is made to dispose of the action as against the Munns.

The ground on which the plaintiff relies is, that before the action the defendant John Munn had written saying he would pay any claim of the plaintiff, and that it was not his intention to remove any logs from the limits until plaintiff was settled with. And this assurance was repeated in a second letter written on 8th January of this year. But

These letters do not contain any admissions there seem to have been any promise to pay. The limit was held and her husband had no interest privity between the plaintiff and

to the matter only as assignee from the mortgage given to them to secure to Mrs. Munn; and it cannot be decided whether or not there was any promise by Mrs. Munn or her husband, who preferred her instructions. The statement of John Munn was acting strictly within her authority given to the lumber company. The money is due to the lumber company, but, that the company are indebted to the plaintiff for the taking of the accounts between

submitted by Mrs. Munn, there certainly is no fault of action. How this is as a fact must be determined after hearing evidence. The motion is granted on that ground.

as in *Armstrong v. Armstrong*, 9 O. C. 301, that the plaintiff can be allowed costs. To do so is to deprive the defendant of costs, which can only be done for

by abandoning the claim for payment by the plaintiff with this action as against them

whether granted or not cannot be determined. It is held that the letters of John Munn are the basis of a writ, not only against him but against the company. It looks as if the plaintiff had been in the suit and had begun proceedings without notice of his rights and consequent remedies.

Therefore this motion must be dismissed with costs to the defendants in the cause.

GARTWRIGHT, MASTER.

JUNE 24TH, 1907.

CHAMBERS.

ELMSLEY v. DINGMAN.

Mortgage—Action for Foreclosure—Failure to Make Lessees of Owner of Equity with Option of Purchase Parties—Final Order of Foreclosure—Motion by Lessees to set aside after Expiry of Lease—Dismissal without Costs.

Motion by the Toronto Granite Co. to set aside, for irregularity, a final order of foreclosure made in May, 1899.

W. N. Ferguson, for applicants.

J. H. Moss, for plaintiff.

G. H. D. Lee, for the Dominion Bank, subsequent incumbrancers.

THE MASTER:—The notice of motion was given in October last . . . but was not argued until 14th June. . . . The motion was made on behalf of the Toronto Granite Co., acting through Mr. A. E. Osler as assignee for the benefit of the creditors of that company.

It is clear from *Scottish American Investment Co. v. Brewer*, 2 O. L. R. 369, and cases cited (see especially p. 376), that such motions must be made promptly when relief is asked as an indulgence. If made on that ground, the motion here must fail.

But the substantial question was whether the Toronto Granite Co. should have been made parties, and whether, if that should have been done, the proceedings can now be reopened.

It seems clear from the documentary evidence that the Toronto Granite Co. had a lease from the owner of the equity of redemption for 10 years from 1st October, 1895, with a right of purchase at any time during the term at a fixed price.

Of this lease plaintiff must undoubtedly have had express notice. A memorandum of agreement is produced, signed and sealed by him, which recites that the Toronto Granite Co. "are the owners of the equity of redemption in the said lands and premises," and extends the time for redemption of plaintiff's mortgage on present payment of a

sum of \$411.10 on account of arrears—which was paid. This was never apparently registered, and plaintiff has no recollection of having had the duplicate. But in this I think he is mistaken, as the solicitor who was acting for the company wrote to plaintiff's solicitor a letter dated 31st March, 1898, saying he enclosed "copy agreement re Toronto Granite Co. Limited." This is produced by plaintiff on his examination on this motion, but he says he cannot find any copy of the agreement with the papers he got from Mr. English, his then solicitor. . . .

The question then is whether the suit is defective by reason of the omission to make the company party to these proceedings.

I think there can be little doubt that as between the mortgagee and the other parties there was not any binding foreclosure at the time it was made, and if the present motion had been made a year earlier it would have been successful. But the case is different now, because the lease to the company from Thorne of 1st October, 1895, expired on 30th September, 1905, and from that date the company ceased to have any rights in the matter. It is just as if the wife of a mortgagor had not been made a party. Though she might successfully apply, yet if she died no one else could have any right consequent on the omission to make her a party.

It is stated that the property has considerably risen in value in the last 2 or 3 years, which, no doubt, explains the launching of the motion.

In these circumstances, I think the motion should be dismissed without costs. I feel less reluctance in this disposition of the matter because, if successful, the motion would enure not to the benefit of the creditors of the company, but of Mr. Thorne and the Dominion Bank. And it is to be observed that Mr. Thorne, as vice-president of the company, and Mr. Anderson, the president, had ample knowledge of the facts of the foreclosure, even though the company technically had no notice of the proceedings.

On the other hand, there is undoubtedly such a substantial margin in the property that plaintiff may well be left to pay his own costs of a proceeding which has only perhaps failed of success by the delay of a year in moving against a clear irregularity.

RIDDELL, J.

JUNE 24TH, 1906

WEEKLY COURT.

RE ASHMAN.

Executors and Administrators — Notice to Creditors and other Claimants against Estate of Intestate — Publication in Newspaper—One of Next of Kin not Heard of for Many Years—Presumption of Death without Issue—Distribution of Assets.

Application by the administrators of the estate of Albert Edward Ashman, under Rule 938 (g), for the advice and opinion of the Court as to a share of the estate retained for a brother of the intestate, who could not be found.

H. Pratt, for the applicants.

RIDDELL, J.:—Albert Edward Ashman, late of Ottawa, died 19th April, 1906, intestate. On 8th May, 1906, the Royal Trust Company were appointed administrators of the estate. An advertisement was inserted in the Ottawa Citizen of 19th May, 26th May, and 3rd June, 1906, in the following form:—

NOTICE TO CREDITORS.

Notice is hereby given, pursuant to R. S. O. 1897 chapter 129, that all creditors and others having claims against the estate of Albert Edward Ashman, late of the city of Ottawa in the county of Carleton, agent, who died on or about the 19th day of April, A.D. 1906, are required on or before the 10th day of June next to send to the undersigned solicitors for the administrators the full particulars of their claims and the nature of the securities (if any) held by them. And further take notice that after such last mentioned day the administrators will proceed to distribute the assets of the deceased among the parties entitled thereto, having regard only to claims of which they shall then have notice, and the said administrators will not be liable to any person or persons of whose claim notice shall not have been received by them.

Dated the 17th day of May, 1906.

THE ROYAL TRUST COMPANY,
by Horace Pratt, 104 Sparks Street,
Their solicitor herein.

ors as were received were paid, all money, and the accounts passed of the county of Carleton. By that tors were allowed their commission. ow; and two sisters and a brother xt of kin. Before the distribution t the solicitor for the administra- following a casual remark of one of deceased had had another brother. the information that this brother, without, so far as can be discov- as going; that not long afterwards sisters that he was in Oregon; that 1895 that he was dead; and that ed from him by any of his friends, ough diligent inquiry has been made be likely to have heard from him. about 1882, leaving some property, an interest if he were alive, but ime did not result in finding him. of his marrying. amounting to \$156.43, to which, be entitled. The administrators urt as to their proper course in the

f the advertisement and the failure er to make any claim, he would be er to make any claim.

897 ch. 129, sec. 38, is the same as 23 Vict. ch. 35, sec. 29, and that is Sherry, 1 C. P. D. 246. In that the statute in referring to "credi- ed to cover next of kin; and that to claims for distributive shares of aims for debts and demands in the

ment sufficient? No doubt, if the reason to believe that the brother ular part of the world, or if they ve that deceased had left children, sed where the children might reas- be living. But here there was no that he was living or that he had was a very small one; and I do not

think the administrators were called upon to advertise more than they did.

It was vigorously contended in *Re Cameron, Mason* and *Cameron*, 15 P. R. 272, that an advertisement of this kind should have been made in the *Ontario Gazette*. But the contention was unsuccessful, and I think rightly so.

I think that the administrators should divide the assets amongst those entitled thereto as though the brother were assuredly dead without ever having had issue. Costs out of the estate.

TEETZEL, J.

JUNE 24TH, 1906.

TRIAL.

FARAH v. BAILEY.

Crown Patent — Mining Land — Action for Trespass — Counterclaim to Set aside Patent — Issue by Error — Improvidence—Repeal of Patent—Scire Facias—Review of Legislation—Rule 241—Jurisdiction of High Court—Fiduciary of Attorney-General — Certificate of Title — Land Title Act— bona fide Purchaser for Value without Notice—Cancellation—Registration.

Action for damages for trespass and an injunction.

W. Nesbitt, K.C., and A. M. Stewart, for plaintiff, Eldridge.

R. McKay and A. N. Morgan, for other plaintiffs.

W. M. Douglas, K.C., and E. J. Hearn, for defendant, Bailey.

C. H. Ritchie, K.C., for Attorney-General for Ontario as defendant by counterclaim.

TEETZEL, J.:—Plaintiffs assert title under a patent of mining claim containing about 17 acres, being part of lot 1 in the 4th concession of the township of Coleman, issued to Farah and Murphy, and dated 21st March, 1906.

The defendants claim under an unpatented mining claim containing 31 acres, part of the same lot, discovered by Clark, a licensed miner, who duly filed his application and

order at Haileybury on 20th June, 1905, and claim were duly inspected on 20th June, 1905.

of the lands described in plain-
chains south of what the defend-
northern boundary of the 31 acres
mining claim, and it is in respect of
as carried on by the defendants
ip that this action is brought.

id excavate and remove a quantity
question on the 16th July, 1906, is
e thereof is uncertain.

is a bona fide purchaser for value
the patent, without notice of de-
holds a certificate of ownership
provisions of the Land Titles Act,

t their right to carry on mining
question under their mining claim
of the Mines Act and regulations
ge that by inadvertence, omission,
drawn and issued to include part
r mining claim, and that the plain-
the defendants' rights when they
in question.

erclaim to have it declared that
aled in so far as it overlaps their

st called for trial, objection was
eneral should be made a party to
ave effect to the objection and ad-
this to be done. Afterwards the
the Attorney-General a consent,
I James Joseph Foy, as Attorney-
of Ontario, do hereby consent to
ant to the counterclaim, on the
nd, and to waive service and other
al of this action;" and the plead-
ingly.

n again for trial, counsel for the
action in the nature of an attack
taken except upon the fiat of the
at, consequently, merely making
the counterclaim was ineffective,

and did not entitle the defendants to give evidence to impeach the patent.

I allowed the case to proceed subject to the objection.

At the close of the case Mr. Ritchie appeared for the Attorney-General and joined with counsel for the plaintiff in making the same objection.

In the view I take of this objection and also of the plaintiffs' rights under the Land Titles Act, it is not necessary for me to determine any of the objections raised by the plaintiffs to the validity of the defendants' mining claim, so far as it affects the strip in question, or whether its true northern boundary should not be south of the strip; but I will assume that the defendants' assignor, Clark, had, at the time of the issue of the patent in question, acquired the right to work the mining claim as surveyed by Mr. Holcroft, and that he had at that time complied with all the requirements of the Mines Act and regulations thereunder, up to and including a full compliance with the first year's working conditions.

I am unable to find that when the original patentees obtained the patent they were affected by any legal notice that any part of the land covered by the patent was in the possession of or claimed by Clark.

Conceding, therefore, that but for the patent and transfers thereafter, the defendants would be entitled as against the plaintiffs to possession of the disputed strip, and to work the same as part of their mining claim, it remains to be considered:—

(1) Whether the defendants can by their counterclaim impeach the patent, or so much of it as overlaps their mining claim, assuming it was issued erroneously or by mistake or improvidently; and

(2) Whether in any case, as against the plaintiff Eldridge, his certificate under the Land Titles Act is not a complete bar to defendants' claim.

As to the first question, there is no doubt that under the common law, "if a Crown grant prejudiced or affected the rights of third persons, the King was by law bound, on proper petitions to him, to allow his subject to use his royal name to repeal it on a *scire facias*, and it is said that in such a case the party may, upon enrolment of the grant in Chancery, have a *scire facias* to repeal it, as well as the King:" Chitty's *Prerogatives of the Crown*, p. 331: Blackstone's *Commentaries* (American ed.), book 3, p. 260.

additional remedy in such a case & 5 Vict. ch. 100, sec. 29, which it enacted that it shall and may be Chancery in that part of this proper Canada, and for the Court of part of this province formerly called ion, bill, or plaint to be exhibited in its respecting grants of land situate is province, respectively, and upon interested, or upon default of the said ce of proceeding as the said Courts n all cases wherein patents for lands d through fraud or in error or mis- e to be void; and upon the registry ice of the provincial registrar of this shall be deemed void," etc.

carried through 16 Vict. ch. 159, sec. 25, 23 Vict. ch. 2, sec. 25, R. 29, without substantial change; but by 50 Vict. ch. 8, schedule, and the

t for land being repealed or voided judgment shall be registered in the and on the revisions in 1887 and ction was adopted; and in R. S. O. ds:—

d Titles Act, if a patent for land is he High Court, the judgment shall gistry office of the registry division

ime there has been no re-enactment by 50 Vict. ch. 8. This leads to a rule 241, which is a reproduction of nd reads:—

he want of enrolment, writs of sum- patent, grants, or other matters of Seal, shall be issued in the same cases trictions, as nearly as may be, as e on the 5th day of December, 1859, t of Chancery in England; and all er shall be the same as the proceed- on; but, before the issue of any such application for the same shall, in the Attorney-General, file, in the

Court from which the writ is to be issued, an exemplification under the Great Seal of the province of the letters patent, grant, or other matter of record with respect to which the said writ is to be issued."

The history of this Rule begins with 22 Vict. ch. 97, the recital of which is: "Whereas the writ of scire facias to repeal letters patent or to make void grants or other matters of record under the Great Seal is an original writ which in England is issuable from the Court of Chancery, founded on a record of the letters patent, grant, or other matters of record enrolled in the said Court; and whereas, owing to the constitution of the Court of Chancery in Upper Canada there is not, as in England, an enrolment therein of the letters patent, grants, or other matters of record under the Great Seal, and the jurisdiction of the Courts of Upper Canada and Lower Canada to issue writs of scire facias is doubtful."

Sections 1 and 2 of this Act are substantially the same as Rule 241, if one substitutes the words "writs of scire facias" in the former for the words "writ of summons" in the latter.

This enactment appeared in the revision of 1877 as ch. 58, secs. 11 and 12, but was repealed in the revision of 1887, Rule 367 having been substituted therefor.

It is to be observed, therefore, that at any rate from 22 Vict. until the repeal of 4 & 5 Vict. in 1887, the law provided two methods of invoking the jurisdiction of the Courts to repeal patents, the one by writ of scire facias, under 22 Vict., the fiat of the Attorney-General being first obtained, and an exemplification of the patent filed, and the other upon "action, bill or plaint," without the necessity of obtaining fiat, etc.

All the reported cases in Ontario involving Crown land patents in which the jurisdiction of the Courts has been exercised, were while the provisions of 4 & 5 Vict. were in force. These cases begin with *Martin v. Kennedy*, 4 Gr. 61, decided in 1853, and are collected in *Holmsted & Langton*, at pp. 24-25.

It does not appear that in any of those cases any objection was raised that a fiat was necessary, but the jurisdiction was assumed to be complete without it, under the provisions of that Act (4 & 5 Vict.).

The effect of repealing those provisions, and leaving Rule 241 as the only mode of procedure provided for invo-

of the Court to repeal letters patent, then discussed in a reported case, and I am decided under 4 & 5 Vict. can assist

The effect is that the jurisdiction of the Court to amend letters patent issued erroneously, or providently, or through fraud (Judicature Act, sec. 8), can now only be exercised if the patent has been brought before the Court after the conditions contained in Rule 241. In other words, they are conditions precedent to be satisfied before he can be aggrieved by a patent before he can be adjudicated upon by the Court.

What is the position of a man who counterclaims in any better position than he is now? I think not; because it is well settled that a counterclaim can only be set up where an action is pending: *Birmingham Estates v. Smith*, 12 Q.B. 285, cited in *Holmsted & Langton*, 2nd

In this question, I am of the opinion that the land is absolutely protected against any claim by the purchaser by virtue of his certificate of title under the Land Titles Act, the scheme of which makes the certificate conclusive evidence of title

in favour of the purchaser for value without notice and when he registered his transfer certificate, he came within the protection which reads as follows:—

“Where a person acquires land for valuable consideration of land registered under the Act, the title shall, when registered, confer on him an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances, and all rights, privileges, and appurtenances thereto, subject as follows:—

“First, to any mortgages, charges, or other encumbrances, if any, entered on the register;

“Secondly, to any rights, and interests, if any, as are entered on the register for the purposes of the Act not to be affected by the Act, if the contrary is expressed on the register; and to any other estate and interests whatsoever, if any, in the land, interests of Her Majesty, her heirs and assigns, within the legislative jurisdiction of the Court.”

See *Estates Company v. Mere Roihi*, [1905] A. C. 176; and *Le Syndicat Lyonnais du Klondyke v. McGrade*, 36 S. C. R. 251.

The defendants' caution was not registered until after the plaintiff Eldridge obtained his certificate, and I do not think it could be successfully argued that the defendants had any title or lien which would affect the plaintiffs' title under sub-sec. 4 of sec. 26 of the Act.

Judgment will therefore be entered in favour of the plaintiffs against the defendants for damages for the trespass and the value of the ore removed, and for a perpetual injunction and costs; and the counterclaim will be dismissed with costs. If the parties cannot agree upon the amount of damages and the value of the ore, there will be a reference to the Master at North Bay to determine the same; the costs of the reference to be paid by the defendants.

MULOCK, C.J.

JUNE 24TH, 1907.

TRIAL.

FREEL v. ROYAL.

Contract—Promise to Convey Land on Marriage—Specific Performance—Statute of Frauds—Intended Marriage—Postponement on Account of Insanity of One of the Parties—Part Performance.

Action to recover possession of certain property consisting of a house and lot in Thorold, which, prior to the conveyance thereof to the defendant McAndrews, was owned by the defendant Rosella Royal and her half brother, subject to a first mortgage thereon to the Security Loan and Savings Company, and to a certain other mortgage to the Quebec Bank.

W. M. German, K.C., and T. F. Battle, Niagara Falls, for plaintiff and defendant McAndrews.

A. C. Kingstone, St. Catharines, for defendant Royal.

defence is that McAndrews and
 red to be married, and that at the
 t was verbally agreed between them
 be sold under the company's mort-
 McAndrews for the defendant as a
 became such purchaser; and that
 to possession in pursuance of the
 entitled to specific performance of
 says that the lands were sold and
 n trust for her and that she is en-

draws, who is insane, by his com-
 cions of the defendant Royal, and
 ands.

is to the following effect. She, a
 a widower, were old acquaintances
 on 7th May, 1906, he made to her
 before its acceptance she informed
 d she owned the property in ques-
 rages thereon, and that beyond the
 that in debt, and expressed a wish
 the mortgages. This, she says,
 that he was willing to purchase the
 me for her, and that on their mar-
 air home, and that the \$900 would
 r debts. Thereupon she accepted
 shortly afterwards she requested
 company to offer the property for
 and this was done, a reserve bid of
 highest offer at the auction was be-
 d the property was withdrawn, and
 y the company to McAndrews for
 paid to the company in cash, and
 n August, 1906, the company con-
 n fee simple, and having applied
 ayment of incumbrances and costs,
 ing to \$216.16, to Mrs. Royal.

agement Mrs. Royal was in posses-
 upying it as a home, and she has
 uch possession and occupation.

ing the property, he proceeded to
 g for that purpose \$457. The con-

tractor received his instructions from McAndrews, Mrs. Royal being present, being consulted by McAndrews, and making suggestions.

On 10th November McAndrews instructed the priest to publish the banns of the intended marriage, and they were accordingly published on Sunday 11th November. On Saturday 17th November he called on the priest, and stated that he was neither physically nor mentally in condition to marry, and directed a discontinuance of the publication of the banns, and in consequence further publication ceased.

Mrs. Royal saw McAndrews every day during the week following 11th November, and came to the conclusion that he was insane, but his physician, Dr. Herod, did not discover any mental weakness until 11th December. On 23rd December his physician recommended his being sent to a sanatorium, and shortly afterwards he was, as an insane person, placed in the Hamilton Lunatic Asylum, and as such has been confined there ever since.

On 16th November, 1906, McAndrews purported to convey the land in question to plaintiff, his half brother, the consideration therefor being \$1. At this time his mental condition was such that he could not make a valid gift of the property to any one, and it is clear from the evidence of plaintiff that he considers himself, not the beneficial owner of the property, but trustee for McAndrews, and there should be a declaration to that effect.

The first difficulty in Mrs. Royal's way is that, according to her own evidence, the purchase by McAndrews was only to enure to her benefit on the marriage taking place, when it was to become the common home of both of them, but she does not say that irrespective of the marriage or prior to its taking place, McAndrews was either to convey the property to her or to hold it in trust for her. Thus the event has not happened, the happening of which was a condition precedent to her being entitled either to the property or its possession. Nor is McAndrews in default in not yet having married her. No date was fixed for the marriage. In such a case the contract is to marry within a reasonable time after request. At most the publication of the banns would only warrant the inference that the marriage was to take place within three months of such proclamation of the intended marriage, being the limit fixed by the Marriage Act, to which such publication applies.

ate man realized on 16th November, and since that day has not consented to the marriage. Mrs. McAndrews was to marry her, and there is no doubt that if he recovered his reason he would have performed the contract of marriage being conditional on his mental ability to give the necessary consent to Mrs. McAndrews's insanity, so long as it consisted in a desire for postponement of the marriage.

That the parol agreement between Mrs. McAndrews and the plaintiff prior to the marriage taking place was to give the property to Mrs. Royal, or to the plaintiff, if there has been no part performance of the agreement, is not out of the statute. The only question is whether the possession by Mrs. Royal from the 27th August to McAndrews. At the time she was engaged to be married, and McAndrews's house repaired and altered with a view to its being used by them as their home when the marriage took place, which they doubtless expected would occur. McAndrews's action in thus performing these circumstances, to retain the property, is one of correct feeling and ordinary prudence under similar circumstances, and it is not a breach of any contract to give the intended property. It is equivocal, not necessary, and the absence of any contract intended to give the property, nor unequivocally re-quirement which she seeks to set up, is not a breach of the equivocal nature of such a contract. Thus the statute in *McAndrews v. Dawson*, 14 Ves. 387; *Ex parte Jennings v. Robertson*, 3 Gr. 513; and *McAndrews v. Dawson*, 7.

The plaintiff is entitled to judgment as the result of the situation being the outcome of the plaintiff's action. It is not a case in which there is any fault on the part of the other party.

JUNE 24TH, 1905.

DIVISIONAL COURT.

RE SHUPE v. YOUNG.

Division Court—Territorial Jurisdiction—Action on Contract—Provision in Contract as to Forum for Action—Validity of Statute Making such Provisions Illegal—Effect of.

Appeal by plaintiff from order of FALCONBRIDGE, C. J., ante 185.

T. J. Robertson, Newmarket, for plaintiff.

G. H. Kilmer, for defendant.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER.

JUNE 25TH, 1905.

CHAMBERS.

SCOTT v. HAY.

Dismissal of Action—Want of Prosecution—Motion to Dismiss—Statute of Limitations—Leave to Proceed—Terms.

Motion by defendant to dismiss action for want of prosecution.

W. E. Middleton, for defendant.

Frank McCarthy, for plaintiff.

THE MASTER:—The action began on 17th October, 1904. Statement of claim was delivered on 15th November, 1904, statement of defence on 22nd November. The plaintiff examined for discovery on 9th December, and defendant on 10th February, 1905.

Nothing has been done by plaintiff since that time. Defendant has filed an affidavit, in which he states as follows: "The sole reason why I have allowed the matter to stand, and not hitherto proceeded to trial with this action, is that I believe the defendant to be financially worthless, and the costs of proceeding to judgment would be wasted."

t from the defendant, and what the
be corroborated by the fact that the
is in respect of certain dealings in
1899. This shews that the Statute
ost intervened before the issue of the
only took proceedings when it became
e statutory bar.

stances, it would seem that the prin-
14 P. R. 446, should be applied.

by Mr. Middleton that, as the statute
tion should all the more be dismissed.
Keenan, 7 P. R. 385, in support of
as an action concerning land, and a
force for more than 18 months. This
been the important element in that
unfair to allow an apparent owner to
er of dealing with real estate at the
t who has not in the first instance
tness.

d, however, arises here; and while I
e defendant from what may seem to
et under the authorities this cannot

ade will provide that the motion be
paying the costs of the motion (fixed
and also setting the case down and
or the next Toronto non-jury sittings,
in due course. In default of any of
ction will be dismissed with costs.

JUNE 25TH, 1907.

VISIONAL COURT.

TO, HAMILTON, AND BUFFALO
R. W. CO.

TO, HAMILTON, AND BUFFALO
R. W. CO.

*Defendants — Cause of Action — Joint
Liability—Tort.*

ants the Dominion Natural Gas Co.
BRIDGE, C.J., ante 115.

G. M. Clark, for appellants.

L. G. McCarthy, K.C., for defendants the Toronto Hamilton, and Buffalo R. W. Co., respondents.

J. G. Farmer, Hamilton, for plaintiff Collins, responder.

D'Arcy Martin, Hamilton, for plaintiff Perkins, respondent.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), dismisses the appeal with costs to all the respondents in any event.

MACMAHON, J.

JUNE 26TH, 190

TRIAL.

MCCANN MILLING CO. v. MARTIN.

Chattel Mortgage—Renewal—Time of Filing—Computation of Year—Validity—Assignment of Mortgage—Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Sale of Stock in Trade by Assignee—Fraud—Delivery of Securities—Costs.

Action by the McCann Milling Co., suing on behalf of themselves and all other creditors of O. W. Martin & Co. against Mary Elizabeth Martin, trading as O. W. Martin & Co., Laura V. Murdoff, and James Barton Murdoff, to set aside a chattel mortgage, an assignment thereof, etc.

W. R. Smyth, for plaintiffs.

A. Abbott, Trenton, for defendants.

MACMAHON, J.:—O. W. Martin prior to February, 1900, carried on business as a grocer in Trenton. Becoming insolvent about that time, he made an assignment for the benefit of his creditors. The assignee sold the estate in bloc, the defendant James Barton Murdoff becoming purchaser and retaining the premises occupied by Martin.

On 21st April Murdoff sold out to defendant Mary Elizabeth Martin (a sister of O. W. Martin) for \$1,983, and took from her a chattel mortgage to secure the purchase money. Dated the same day, covering "all that stock of groceries and crockery ware, with all shop fixtures, flour and feed, and all stock contained in the shop and store, and all stock of a sim-

er be brought on the said premises in the usual course of trade, or to from time to time, the same upon premises and placed in stock to be ts, and subject to the conditions rein, being the stock mentioned and et as purchased by mortgagor from W. Martin."

anted to pay "the full sum of ayable weekly on unpaid principal, 5 per cent. per annum, as follows: 4 months from date in full, but in to be made weekly on the Monday during said term, of \$50 each, and ums of money taken from the sale week not required for current ex- pay for goods to replace those sold up to present value, to be paid to t, and to be applied with said weekly principal. The mortgagor to have in addition to said sums at any time e first of such payments to be made

stood and agreed between mortgagor credit is to be given to any person consent of the mortgagee, who may said premises and examine all books in management of said store, may ne is not satisfied with the account sales, which are to be kept carefully

rstood that the wages to be paid or the said shop \$15 per week, un- mortgagee be first obtained to any further agreed that the mortgagee t at same time of payment of said on the sales of the preceding week ces in helping to manage said busi-

r covenants with the mortgagee to ck replenished so as to be worth as ime, and mortgagee may order same e, to ensure this being done."

Mary Elizabeth Martin carried on the business under the name of O. W. Martin & Co.

The mortgage was filed on 26th April, 1904, at 10 o'clock a.m.; and a renewal thereof was filed on 26th April, 1905, at 10 o'clock, shewing the amount remaining due on 15th April, when the affidavit was sworn to, as being \$1,059.93.

In September, 1905, Murdoff assigned the chattel mortgage to his wife, the defendant Laura V. Murdoff.

Murdoff had a key to O. W. Martin & Co.'s shop, and went in almost daily to see how the business was being conducted, examine the books, &c.

About 12th February, 1906, Murdoff took absolute possession and control of the store, and excluded Mary Elizabeth Martin therefrom; and on 19th February O. W. Martin & Co. assigned to Murdoff for the benefit of creditors, and a meeting of the creditors was called for 28th February, at which Murdoff acted as chairman, and a motion was made to remove him from the assigneeship, but, as defendant Laura V. Murdoff voted on the amount payable under the chattel mortgage assigned to her against the motion, there was a majority in value against the motion, which the chairman declared defeated.

Murdoff stated that the assignment was made to him because the local creditors desired it.

At a meeting of the inspectors, they instructed the assignee to advertise and sell. There were 3 or 4 tenders and the assignee said he accepted the highest for the stock, it being \$615, made by the nephew, who paid cash therefor.

A motion was made, returnable in the High Court, on 9th March, to change the assignee, and an enlargement was obtained by Murdoff's solicitor on a telegram which stated "Wire received. Assets will not be interfered with." The motion was enlarged from time to time, the last enlargement being until 30th March. A second meeting of creditors was held on 28th March, when, upon motion, the assigneeship was changed from Murdoff to George F. Hope, sheriff of the county of Hastings.

On 10th April, 1906, a demand was made by G. F. Hope, the assignee, upon Murdoff and Abbott, his solicitor, requiring them and each of them to deliver to him the goods, chattels, and effects, moneys and securities, and the books, papers, and documents, connected with the insolvent's estate. The demand on Murdoff as to the money realized from the sale of the stock was not complied with, he claiming it

virtue of the chattel mortgage assigned Abbott, in whose possession the books thereon for costs in connection with findings.

raised as to the sufficiency of the document the chattel mortgage. But it was conceded the original mortgage was filed on 26th of August at 10 o'clock, and as the renewal was not filed on 5th of September, at 10 o'clock, the filing was too late.

S. O. ch. 148, every mortgage or copy of this Act shall cease to be valid in the hands of the person making the same . . . if one year from the day of the filing of the mortgage or 30 days next preceding the expiration of one year a statement exhibiting the mortgage . . . is filed in the office of the court. In *Thompson v. Quirk*, 18 S. C. 249, a chattel mortgage was filed on 12th August, at 4.10 p.m. of that day, and a renewal was filed at 4.49 a.m. on 12th August, 1887 (the North-West Territories No. 5, sec. 9, of the Mortgage Act), Mr. Justice Patterson said: "The time mentioned in this section, the day of the filing should be excluded, and the mortgagee should have been required to file the mortgage on the whole of 12th August, 1887, to file the

mortgage in ample time by the mortgagee, so as to apply the amount realized from the proceeds of the mortgage.

It was held by the plaintiffs the McCann Milling Company, two or three other creditors, to O. W. Murdoff taking possession of the premises. Murdoff took possession of these premises and therefore a holding out by him of O. W. Martin & Co.'s business. Murdoff came addressed to Martin & Co. after the store never entered the premises; not them, and, it was understood, put up with taking receipts for them. There was no offer of conduct on Murdoff's part in dealing with the firm of O. W. Martin & Co. that he was a partner therein. Murdoff, solicitor, refused to deliver the books of

account connected with the insolvent estate to Sheriff Hope, the substituted assignee, claiming a lien for costs thereon. The solicitor was entitled to be paid his costs of the moneys realized from the sale of the insolvent's estate, and James B. Murdoff, the original assignee, is liable to him therefor.

There will be judgment for defendants declaring that the chattel mortgage of 24th April, 1904, made by the defendant Mary Elizabeth Martin to the defendant James Barton Murdoff is valid as against the creditors of O. W. Martin & Co.; and that the assignment thereof by James B. Murdoff to defendant Laura V. Murdoff is a good and valid assignment, and made without any fraudulent intent; that the sale of the stock of Mary Elizabeth Martin, trading as O. W. Martin & Co., by James B. Murdoff, as assignee of said firm, was without fraud; and that defendant Laura V. Murdoff is entitled to the proceeds of the sale thereof.

And I direct that the defendant James Barton Murdoff do deliver to the plaintiff George F. Hope the books of account and all promissory notes or other securities now in the possession of A. Abbott, and held by the latter as his solicitor, subject, however, to the lien (if any) of said Abbott in respect to his costs.

The defendants will be entitled to three-fourths of the costs of the action, and the plaintiffs to one-fourth of the costs thereof, which I direct shall be set off against the defendants' costs.

MULOCK, C.J.

JUNE 26TH, 1907.

TRIAL.

REX v. McMICHAEL.

Criminal Law—Conspiracy—Criminal Code, sec. 520—Trade Combination — Illegal Agreements—Prices—Preference — Members of Associations—Preventing Competition — Conduct and Participation in Illegal Agreements—Conviction —Penalty—Fine—Costs.

Indictment of defendants for a conspiracy. Trial without a jury at Toronto.

E. E. A. DuVernet, for the Crown.

G. H. Watson, K.C., for defendants.

MULOCK, C.J.:—The defendant Peter McMichael and others are charged by indictment with a conspiracy under sec. 520 of the Criminal Code, the indictment containing counts bringing the charge within sub-secs. a, b, c, and d.

A. A. McMichael, one of the defendants, has since trial died, and the defendant Bush was not proceeded against. I have, therefore, only to deal with the case against Peter McMichael.

The evidence shews that continuously since 1st May, 1902, Peter McMichael has been the manager of the Dominion Radiator Company, an incorporated company, carrying on business in Toronto as dealers in radiators and boilers.

For some time prior to 1903 there existed an association of plumbers and steamfitters called the Master Plumbers and Steamfitters Association, and also another association composed of dealers in goods required by plumbers and steamfitters. Negotiations having been conducted between these two associations, by representatives of each association, with a view to an understanding being arrived at in regard to matters of interest to the members of these associations, in May, 1903, an agreement was reached and reduced to writing, and is in the following words:—

“Memorandum of agreement between the Master Plumbers and Steamfitters Association and the representatives of the undersigned supply houses made this day of 1903.

“Whereas negotiations have been under way for some months between the parties hereto with a view to improving the conditions of the trade generally, and to protect the **Master Plumbers and Steamfitters Association** by giving the association a preference over non-members on all plumbing and steamfitting goods purchased from the undersigned firms.

“It is hereby agreed between the parties hereto as follows:—

“ That the members of the Master Plumbers and Steamfitters Association will endeavour to buy all goods for their work from, and will give the preference on all purchases where prices are equal to, the jobbing and supply houses signing this agreement.

"That the undersigned supply houses will not sell to the general public plumbing goods or steam, hot water, or gas fittings, but when prices are asked from them they may

quote parties wanting an idea of cost not less than 25 per cent. over the association prices.

"That the undersigned supply houses will not sell plumbing goods or steamfitting, hot water, or gas fittings (except steam pipe and fittings) to the trade generally, except at an advance of 20 per cent. upon the prices quoted to members of the Master Plumbers and Steamfitters Association, and that they will give the said members in good standing, unless otherwise notified by the association, a preference of 20 per cent. on all purchases made by said members better than the figures at which they will sell a like quantity and quality of similar goods to persons in the trade who are not members of the Master Plumbers and Steamfitters Association.

"In witness whereof, the undersigned have hereto set their hands and seals, this day of , 1903.

The Canada Radiator Company, Ltd.,

per J. J. Travers, Man. Director.

Jas. Robertson Company, Ltd.,

A. A. McMichael, Vice-Pres.

Stevens Manufacturing Company,

per F. N. Connell.

The Ontario Lead & Wire Company, Ltd.,

per Fred. Somerville, Mgr.

Ideal Manufacturing Company,

per W. S. Jackson.

Dominion Radiator Company, Ltd.,

P. McMichael, Mgr.

Toronto Hardware Manufacturing Company,

per J. H. Paterson.

Gurney Foundry Company, Ltd.

E. Gurney, Pres.

The F. W. Webb Manufacturing Company

have signified their intention of signing

the agreement on presentation to them

James Morrison Brass Manufacturing Company

Chas. E. Morrison, Sec.-Treas."

The Dominion Radiator Company became a party to this agreement, the defendant P. McMichael signing it on behalf of the company. Its terms were arrived at as a result of meetings between a committee of the Plumbers and Steamfitters Association, Mr. McMichael, and others. This agreement continued in force until the autumn of 1904, when the parties entered into another and more rigid agreement. The

hereafter referred to, and, in order to
 ions, the Plumbers Association adopted a
 monthly lists or directories, setting forth the
 s and steamfitters and supply men re-
 stem continued in force well on into the
 meantime the Plumbers Association had
 d under the name of the Master Plumbers
 o-operative Association, Limited, and took
 bers, assets, and liabilities of the unincor-
 , and somewhat later the supply men
 d under the name of the Central Supply
 ada, and there also sprang up another
 ny called the Central Supply Association
 d, and negotiations were had for agree-
 ed into between the latter and the two
 orations, but, owing to a question as to
 proposed agreements, they were never
 and I refer to these latter efforts and pro-
 ducating that up to this time, September,
 ere endeavouring in another form to carry
 rpose indicated by the agreement of May,

, I think, contravenes the provision of
 ninal Code. Its declared object is to give
 mbers over non-members of the Master
 mfitters Association, such members agree-
 o buy all goods required for their work
 preference on all purchases where prices
 obbing, trade, and supply houses which
 t. The supply men agree not to sell
 e., to the general public, but when prices
 prices not less than 25 per cent. over the
 price. Further, the supply houses agree
 g goods or steamfitting, hot water, or gas
 le generally, except at an advance of 20
 price quoted to members of the Master
 mfitters Association, and to sell to such
 anding at 20 per cent. less than to non-

bject of these stipulations was to prevent
 obtaining goods except from the members
 nbers' Association, and at an extra cost
 ent., and to that end to drive out of busi-
 ho would not enter into the combination.

During the continuance of this agreement the various parties endeavoured to live up to its terms, and, in consequence, many plumbers who were not members of the Plumbers Association were greatly hampered in obtaining their necessary supplies, in several instances being actually refused by the supply men for no reason except that of their being non-members of the association. Occasionally some of the supply men sold to non-members in contravention of the agreement, and it was then the practice of the Plumbers Association to endeavour to discipline such offending supply men by fines and otherwise.

In October, 1904, the two associations entered into a further agreement, whereby the supply men again agreed to give a preference to the members of the Plumbers Association, such members agreeing to make their purchases from such supply men, and the latter agreeing to sell to such members only. This second agreement was intended to be more rigid than that of 1903, for, whilst the latter permitted supply men to sell to outsiders at 20 per cent. advance, the new agreement was intended to absolutely prohibit selling to any but members of the association.

In order to give effect to this latter agreement, monthly lists or directories were issued by the Plumbers Association, one of which monthly lists shewed who were members of the Plumbers Association in good standing, and also non-members, and opposite the names of the latter were stars indicating that the supply men were not at liberty to sell to them. There was also published a companion monthly list shewing the names of members of the Supply Association who were parties to the agreement, and it was the understanding that the members of the Plumbers Association should purchase only from the supply men who were parties to this agreement.

The idea resulting in the issue of these lists appears to have originated with the Plumbers Association, but before its adoption the supply men who had signed the agreement of 1903 were consulted on behalf of the Plumbers Association, and informed that the latter had decided to purchase only from those members of the Supply Association who desired their names to go upon the lists, and it became necessary for any supply house that desired its name on the lists to agree to confine its sales to members of the Plumbers Association.

the Dominion Radiator Company was on succeeding lists of supply men in good

the Plumbers Association of 13th Feb-
the following:—

Radiator Company were charged with to the York Loan Company. This firm large, but claimed it was an oversight of and also gave an assurance that this n. Under the circumstances, the board ation. Both companies, the Dominion and the Gurney Foundry Company, gave nce that they had no further orders to bers.”

Secretary of the Plumbers Association, est of his knowledge Mr. P. McMichael plumbers’ board on behalf of the Do- mpany, in connection with the matters egoing minutes, and Mr. McMichael did tatement.

ment of May, 1903, was entered into, firms out of 125 in Toronto became gement, but the membership increased bers being compelled to pay 20 per cent.

The Plumbers Association from time their monthly lists the names of supply e agreement, but the Dominion Radiator ays remained on the lists. It is, there- company actively assisted in the con- ne.

on his evidence states in effect that his instance actually charged and collected t. from purchasers, in all instances the charged and then rebated; that in con- ogation of the agreement of May, 1903, e from Mr. Meredith, secretary of the n, to attend a meeting; that he attended it was stated by the Master Plumbers committee, that they were not satisfied he agreement in question, and that they int where they were going to compel elusively to their association; otherwise ociation would not buy from them.

Mr. Meredith put it that the Dominion Radiator Company, if they had chosen, might have successfully withstood the movement of the plumbers, but Mr. McMichael's evidence was to the effect that if the supply men had united they could have successfully resisted the plumbers, but it was not possible for the Dominion Radiator Company, acting alone, to have done so.

The following are extracts from Mr. McMichael's examination: To Mr. Watson:—"Q. What I want to know is as a matter of business, of business interests, was it practicable to resist that demand? A. No sir, it was not."

After stating that he could not offer any explanation for his company's name being on the monthly lists, the following examination took place:—

"Q. Did you make any agreement with them on the subject? A. No, I don't. You refer now after the 1904?

Q. Yes? A. No.

Q. Why did you yield to the demand? A. It was no protection of my company's business, because if we had not yielded we certainly would not have got the support.

Q. And after that time what course did you take with regard to sales to non-members? A. We don't press for sales to tell the truth.

Q. Did you make sales to non-members after that? A. Yes, we made sales to non-members.

Q. After that time did you refuse to give any one goods? A. At a certain time we did: it was some time in February. And further on he says: "There was. This trouble arose between ourselves and the Master Plumbers Association that if we continued to deliver to Bigley they would take our name off that list."

Q. You had up to that time been furnishing him, although a non-member? A. Yes.

Q. And they came to you? A. Yes.

Q. What was the result of that coming to you at that time? A. We had to yield to their demand.

Then further on he states that Mr. Meredith called at the company's office and went through their books, and stated that he would report the Bigley matter to the association, and the company could abide by the consequences. Mr. McMichael says: "I told him not to be in such a hurry."

ke some time to look at it; and he got further on Mr. McMichael says: "He been there (meaning the office of the Company) several times—half a dozen self have had to spend a whole day and tators that were delivered to a jobber in were turned over to a non-member, and delivery of these radiators; how they had at man's hands; otherwise they were against us."

t: "Q. I think you have told us very this agreement of May, 1903, and you up to it, that is right? A. Outside of n I refer to.

way, I think you told us quite frankly recement or arrangement of 1904 in Oc- put very plainly before you, and you tly what the conditions were, that is advised as to what the policy of the ssociation would be from that date out. told what the consequences would be?

accept their conditions? A. I accepted ee I could have anything to accept. I o out single handed and fight; if by my ust have done so.

said there was an outside position and A. Yes.

ferred the inside? A. On account of the ere.

g you had the very best reasons for ac- tion? A. I had certainly very good e we would have gone out; we would not usiness, but our business would have t extent and we could not carry it on.

time you did accept their conditions? y you put it, yes.

Meredith would check you off from time er you were living up to your agreement?

"
ion from Mr. McMichael's examination o the pressure of the Plumbers Associa-

tion, and that his company, through his action, became a party to the agreement of October, 1904, and to the methods adopted in order to give effect thereto.

What I have said as to the illegal nature of the agreement of 1903 is equally applicable to that of 1904. The goods, the subject of each agreement, are articles or commodities which are properly the subject of trade or commerce. The agreement of 1904 was also one to unduly limit the facilities for supplying or dealing in them; to restrain or injure trade or commerce in relation thereto; to unreasonably enhance their price; and to unduly prevent or lessen competition in their purchase, sale, and supply.

The question is, whether the defendant Peter McMichael's participation in these illegal agreements or conspiracies was such as to make him liable. From a careful review of the evidence, I find the following facts as regards McMichael's conduct in connection with the making of each of those two agreements and with certain events flowing therefrom. As manager of the Dominion Radiator Company he conducted the negotiations with representatives of the Plumbers Association which culminated in the agreement of May, 1903. On behalf of that company he personally signed the agreement. Thereafter as manager of the company he endeavoured to have his company live up to the terms of the agreement. As representative of the company he took part in negotiations which led to the making of the agreement of October, 1904, and the issuing of the lists or directories with a view to his company carrying out the terms of the latter agreement, and he endeavoured to cause his company to live up to the terms of this latter agreement. His conduct was not merely that of acquiescence, but of personally promoting the agreements in question and of causing his company to carry out their terms.

Having thus actively aided in the bringing about of these illegal conspiracies or agreements, he is, under sec. 61 of the Code, liable as a principal, and I find him guilty of the offences charged against him under sec. 520 of the Code and impose on him as a penalty a fine of \$250, and the costs incurred in and about his prosecution and conviction, and in default of payment within one month after the amount of the costs is ascertained, then I order his imprisonment for three months.

JUNE 27TH, 1907.

A.—CHAMBERS.

DE v. ELLIOTT.

*Deal—Leave to Appeal from Judgment
in Controversy — Action to Set aside*

for leave to appeal direct to the
the judgment of TEETZEL, J., at the
ng the action as against defendant

plaintiff.

g, for defendant Elliott.

Field, for defendant, did not con-
not a proper one in which to make
at there is jurisdiction. That de-
peal would lie as of right from the
to the Supreme Court of Canada:
c. 76 (a).

e assignee of one James H. Drink-
ments and Preferences Act, R. S. O.
nding Acts, to declare void two in-
one of chattels and the other of
endant Drinkwater to his co-defend-
the same debt, the plaintiff alleging
y way of preference with intent to
ther creditors.

t the time of the commencement of
of the indebtedness secured by the
000, but the defendant Elliott con-
itigation, moneys have been realized
ced his claim below \$1,000.

dispute, the plaintiff alleging that
represent part of Drinkwater's
t must account to the plaintiff, if
ed.

Upon the material before me, and for the purpose of this application, I think I should conclude that the sum in controversy in the appeal exceeds the sum or value of \$1,000, exclusive of costs, and that there is jurisdiction to make the order asked for.

I make the usual order, giving leave under the Statute. It should contain a recital as in *Mathewson v. Beatty*, W. R. 869. Costs as usual.

RIDDELL, J.

JUNE 28TH

CHAMBERS.

RE CANADIAN PACIFIC R. W. CO. AND BYRNE

Railway—Purchase of Lands for Railway—Power of Attorney—Order of Judge — Railway Act, R. S. C. 1906 ch. 37, secs. 184, 185—Infants—Payment of Purchase Money into Court.

Application by the widow of James Byrne for an order giving her the right to sell certain land to the railway company.

A. D. Armour, for the applicant and the company.
F. W. Harcourt, for infants.

RIDDELL, J.:—James Byrne died in 1897, leaving a will which had the effect of vesting in his widow an estate in life in certain lands, with remainder to his children.

The Canadian Pacific Railway Company desiring to purchase a right of way across this land, it was agreed between the widow with the railway company that they should pay a sum of \$30 per acre for such land as they required. The children are infants, but the price has been approved by the official guardian, and seems reasonable.

An application is now made under secs. 184 and 185 of the Railway Act, R. S. C. 1906 ch. 37.

The provisions of these sections are precisely the same as those of the Railway Act, 1903, secs. 144, 145. Section 144 of the Railway Act, 1903, is totidem verbis sec. 144 of the Act of 1888, 51 Vict. ch. 29, and sec. 145 is the same.

1888, with trifling and unimportant

by Re Dolsen, 13 P. R. 84, which

s of sec. 184 of the Railway Act,
r to sell and convey to the Canadian
the land mentioned and the rights
his power, joined to her legal power
able her to sell and convey the fee.

will be paid into Court, and the
t to the widow for life; after her
equally divided amongst the child-
t be desired that the money should
the matter may be mentioned.

railway company will pay the costs.

JUNE 28TH, 1907.

TRIAL.

RLEY v. LAMB.

*Real Property Limitation Act—Title
gement as to Working Land—Time
Statutory Period — Payment of
Payment—Gift of Land—Evidence
Relieved from Liability — Right to
Defendant—Lien for Improvements.*

session of land and for an injunc-
et up ownership by gift or under
as.

for plaintiff.

Barrie, for defendant.

m Stewart, the owner of the lots
mortgage on 8th September, 1893,
400: McClinchy, 15th November,
a Heyden; the executors of Barbara
, to Laurence Heyden.

William Stewart by his will made 18th February, 1887, devised all his real and personal property to Mary Stewart, and died in August, 1895. Mary Stewart granted in fee simple 15th November, 1895, to Laurence Heyden, and 20th December, 1905, Laurence Heyden and Mary Stewart executed a deed whereby, after reciting that Laurence Heyden was the owner, Mary Stewart quitted claim to Laurence Heyden, and Laurence Heyden leased to Mary Stewart for life. Laurence Heyden dying intestate, letters of administration were, 25th October, 1906, granted to Barbara Heyden, his sole next of kin, and she, 25th March, 1907, granted by deed to the plaintiff.

The property in question consists of two lots about 3 acres in all in extent, upon which is built a house; adjoining it is another lot of about one acre in extent, the property of the defendant, and upon this is another house, in which defendant lives and was living during all the time to be considered in this matter.

William Stewart having admittedly been in possession of the land before the defendant, the paper title of the plaintiff is made out as against the defendant.

William Stewart continued to reside upon and be possessed of this property until the time of his death. After his death, which, as has been said, took place in August, 1895, his widow continued to reside as before; and her possession was not interfered with, notwithstanding the deed she made 15th November, 1895. Precisely upon what terms she was permitted to continue in occupation does not appear; and it is plain that by the lease and quit claim of 20th December, 1905, she admitted the ownership of Laurence Heyden.

The defendant lived in his house upon the property adjoining. He says that 3 or 4 days after the death of William Stewart, his widow was talking of going to Ireland, but that he recommended her to remain in her own house, telling her that she would never want for anything so long as she lived. And then, he says, she said: "Michael, if you can do anything with the place, take it and do what you can with it for yourself and family: all I want is my little house." He says that in 1895 Mrs. Stewart had it in crop: and in the fall he ploughed $1\frac{1}{2}$ acres and in the winter or

the following spring he took away the fence between the two places, and thereafter continued to work the whole 4 acres (with the exception of a small plot by the house) as one. Mrs. Stewart continued to reside in her house until the autumn of 1906. She died in February or March, 1907.

He claims either by this alleged gift or by the Statute of Limitations.

The defendant, I judge by his demeanour and conduct in the witness box, is not worthy of credence, and nothing is to be taken or accepted as proved in his favour by his evidence. So far as any matter in favour of the defendant is concerned, his evidence is to be entirely disregarded. The evidence called to corroborate the defendant in respect of the alleged gift of the land, I am not satisfied with. For example, Howell, though he says that Mrs. Stewart told him that she had given the piece of land to Mike and his little family, also says that he understood that Mike had the place rented from her. His recollection I do not rely upon, and Mrs. Lamb, wife of the defendant, I do not credit. None of these witnesses by their demeanour impressed me favourably, very much the reverse indeed.

I find that no such arrangement has been proved. But that there was a contract between Mrs. Stewart and the defendant, I think is proved.

In a conversation with Martin Sears, which I find did take place substantially as Sears gives it, the defendant said that he had the place rented from Mrs. Stewart at \$12 a year. Taking all the evidence, I find that Mrs. Stewart rented to defendant the land in question, all but the house she continued to occupy and the small piece of land adjoining, for a rental of \$12 per annum. I find that this arrangement was not made until the autumn of 1897. My reasons for so holding, amongst others, are as follows. I believe that the defendant made an arrangement with Mrs. Stewart, but not that for which he contends, and that this arrangement was made in the summer or autumn immediately before he removed the fence between the two lots.

The evidence as to the time at which the fence was so removed is conflicting. Upon full consideration of the evidence, and notwithstanding the evidence called to corroborate the plaintiff, I remain of the same opinion as I was at

the close of the case, that is, that the fence was not removed until after 1897. I give credit to the evidence of Sea Maynard, and Mrs. Sollett, and do not credit the evidence of the defendant and those called by him to corroborate him. I think, therefore, that the arrangement was made at some time in the autumn of 1897. If this be the case, the statute does not begin to run until some time in 1898. R. S. O. 1897 ch. 133, sec. 5 (6).

The right of Mrs. Stewart is in the plaintiff, at the least by the deed of 1905, and I think the defence fails.

If the contention made on behalf of the defendant were true, namely, that he came in as a trespasser, I think the statute did not begin to run at all till the removal from the property of Mrs. Stewart. She having the legal title, being in possession of part of the property, was, in contemplation of law, in possession at all times of the whole.

My finding of fact relieves me from considering the question as to the onus of proof in respect of payment of rent. As at present advised, I think that where a claim is made to property under the Statute of Limitations, it is incumbent upon the person so claiming to prove affirmatively non-payment of rent. I find that defendant has not proved that he did not pay rent to Mrs. Stewart; that, for all that I find proved, he may have paid rent each and every year that he worked the property, down to and including 1905. If the arrangement between Mrs. Stewart and the defendant had been able to find began in 1895, as at present advised, I should have held that the defence was not made out. Section 5 of the Act provides that the right of the landlord to bring an action "shall be deemed to have first accrued at the determination of the first of such years or other periods or at the last time when any rent payable in respect of such tenancy was received, whichever last happened." As at present advised, I think the person claiming by statute must, as part of his case, prove that "the last time when any rent payable in respect of such tenancy was received" was 10 years before the teste of the writ. Some support is to be found for this proposition in the judgment of Malins, V.-C., at p. 290 of *In re Allison*, 11 Ch. D. 290. I do not find a decision upon this point, though there are some cases, as e.g., *Doe dem. Spence v. Beckett*, 4 Q. B. 100, in which the plaintiff actually did prove affirmatively

cases cited by Mr. Creswicke from Law-Evidence, 2nd ed., ch. 15, do not, I think, establish the fact. The 10th edition of Best on Evidence (10th ed.) moreover lays down that "the fact of fraud is proved by any . . . circumstance which renders the fact probable."

in impoverished circumstances of Mrs. Lamb. At all she had in the world was this. The facts that the defendant admittedly killed once a year, meat of other kind from the butcher, apples when she paid money at least once, entitle me to presume that each year at least some of the rent was paid, and that substantially all the rent was received from the defendant. Notwithstanding the fact (if it be a fact) that she complained that she had not got anything but a dollar of his rent from him. The defendant intended his pork, etc., as in part to pay the rent.

As to the effect of the transaction between the parties; that may be found another way.

The case is not made out, and that judgment should be given to the plaintiff as asked, and an injunction should be made by my brother Britton: 9 O.

It will follow the event; the taxing officer should give the letter of indemnity, dated 2nd day of the month, to the plaintiff from all liability for costs, to entitle him to costs from the defendant. Upon that point.

At any improvements made by the defendant under such circumstances as to entitle him to be made by him as tenant and to inure to him as such tenant.

Moss, C.J.O.

JUNE 28TH, 190

C.A.-CHAMBERS.

MOOR v. CITY OF TORONTO.

*Appeal to Court of Appeal — Leave to Appeal from Order
Divisional Court — Absence of Special Grounds — No
repair of Highway — Injury to Pedestrian — Action
Brought in Time—Misfeasance—Nuisance.*

Motion by plaintiff for leave to appeal to the Court
Appeal from order of a Divisional Court affirming judgment
at the trial dismissing the action.

J. W. McCullough, for plaintiff.

F. R. MacKelcan, for defendants.

Moss, C.J.O.:—In this action, which is for injury
alleged to have been received by plaintiff owing to a plank
in a sidewalk on the east side of Bathurst street having
given way under him while walking upon it, the trial Judge
assessed the damages at \$300, but dismissed the action
because it was not brought until after the lapse of more than
3 months from the occurrence of the accident. A Divisional
Court unanimously affirmed the decision of the trial Judge
and plaintiff now asks leave to appeal to this Court.

Upon consideration, I do not find in the case any special
reasons for treating it as exceptional, and compelling defendants
to submit to a further appeal. *Miller v. Township of
North Fredericksburg*, 25 U. C. R. 31, seems very much in
point. It appears to have stood unquestioned during
many years that have elapsed since it was decided, and
if it is to be reviewed it should be in a case involving greater
interests than the present.

The point that the accident was due to misfeasance on
the part of defendants does not strike me as even plausible
maintainable upon the evidence, and the same may be said
of the suggestion that the maintenance of the defective
sidewalk was a public nuisance causing special damage to
plaintiff.

Motion dismissed without costs.

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TORONTO, JULY 18, 1907.

No. 8

JUNE 26TH, 1907.

DIVISIONAL COURT.

SOUTH WESTERN TRACTION CO.

*Railway—Animal Killed on Track—Elec-
—Ontario Railway Act—Duty to Fence—
a Public Highway—Negligence.*

appeals from judgment of County Court of
plaintiffs, upon the findings of a jury, for
damages for a horse killed by an electric car of
the defendant's line in the township of Southwold,
on account of negligence of defendants in omitting

heard by FALCONBRIDGE, C.J., TEETZEL,

London, for defendants.

St. Thomas, for plaintiff.

J.J.:—The whole case turns on whether
the defendants are liable on defendants to fence their track
from adjoining properties. It is well settled that the liability
to fence arises by statute only; there
is no liability to fence, either as respects the
track or the adjoining properties; see the
case of *Turner Cattle Co. v. Manitoba and North-*
west Ry. Co. 6 Man. L. R. 553.

way cases, and those which have been
decided on the construction of the Railway Acts of the

Dominion, have, owing to the different wording statutes on which they depend, to be regarded with caution and are not in fact a guide in this case. The obligation, any, is to be found in the statutes of the province of Ontario.

The Act of incorporation of defendants is the 20th Edw. VII. ch. 96. By sec. 20 thereof the several clauses of the Electric Railways Act and its amendments are incorporated with the special Act. The Electric Railways Act, R.S.O. 1897 ch. 209, sec. 42 (1), . . . sub-secs. 1, 2, and 3 . . . are the same provisions as are contained in the Ontario Railway Act, 1906, sec. 87, sub-secs. 1, 2, and 3. By 6 Edw. VII. ch. 121, sec. 4, the Ontario Railway Act is to govern wherever the provisions of the special Act and the Railway Act relate to the same subject matter.

It is quite clear that the portion of the railway in question is not "passing along" a public highway. "Along" here means "on" and not "alongside of," or "by the side of;" see several cases decided in different States of the Union and collected in Am. & Eng. Encyc. of Law, 2d ed. vol. 2, p. 175. The section would be quite insensible if the word had any other meaning.

Even if full and literal effect be not given to the broad words of sub-sec. (3) in both statutes, it has been held upon competent evidence that the accident was caused by the want of a fence, and defendants are liable, unless they can be exonerated by sec. 87, sub-sec. 6, which does not apply here: or by sec. 238. . . . This section applies when animals are permitted to be at large within half a mile of the intersection of a highway with a railway, and we are relieved from considering whether the horse was permitted to be at large, by the fact that there is no evidence that it was within half a mile of a railway.

Of course no agreement by land owners with the railway company can have any effect in taking away the plaintiff's rights.

The appeal must be dismissed with costs.

TEETZEL, J., concurred.

MAGEE, J., dissented, for reasons to be stated in another case.

JUNE 27TH, 1907.

WEEKLY COURT.

CANADIAN PACIFIC R. W. CO.

*Death of Servant — Neglect to Keep
Fault of Railway Company or Officer—
Liability—Suggested Intervention of Attor-
ney by Widow of Servant to Recover
Fatal Accidents Act—Consent Judg-
ment not Suspended—Approval of Court—
Damages.*

for judgment in the terms agreed
upon, and for the approval thereof by
the infant plaintiffs, and for an ap-
portionment of \$2,318.58 among the plaintiffs,
Court of the shares of the infant

heard at the Ottawa Weekly Court.

Ottawa, for plaintiffs.

Ottawa, for defendants.

On the 29th April, 1907, Andrew M.
operative in the employ of the defend-
ants of that company, was killed. Be-
fore by counsel for the defendants that
the unfortunate man was, fell through
the fact that the bridge had been allowed to
fall into disrepair was thus killed. The claims
investigated the facts and found that
defence to an action at the instance
children of the deceased. Accordingly
to that the defendants should pay the
amount of three years' wages of the
deceased issued by the widow and her two
children of the deceased; and the case was
heard at the Weekly Court at Ottawa, on
motion that the plaintiffs be awarded
of \$2,318.58, for an apportionment of
plaintiffs, and for an order for pay-
ment of infants' shares.

Counsel for the defendants appeared and admitted that the defect in the bridge was due to the negligence of some person for whom the defendants were responsible (though he was unable to name the particular persons, the superintendent was suggested by counsel for the plaintiffs), stated that there was no defence, and submitted to judgment as asked.

The facts of this case, if correctly stated, disclose a case.

The Criminal Code, R. S. C. 1906 ch. 146, sec. 284, provides: "Every one is guilty of an indictable offence liable to two years' imprisonment who by any unlawful act or by doing negligently or omitting to do any act which it was his duty to do, causes grievous bodily harm to any person."

In the Supreme Court of Canada, in *Union Colliery v. The Queen*, 31 S. C. R. 81, the effect of this section was carefully considered and authoritatively settled. The company in that case "in pursuance of their corporate powers had for a long time been operating a railway . . . by means of locomotives. . . . The road crossed the Fraser river by means of a bridge. . . . The company, neglecting to use reasonable care in maintaining the bridge so that it became unsafe, ran a train . . . across it, which broke through, owing to the rotten state of its timbers, causing the death of six persons then being on the train." *per Sedgewick, J.*, at pp. 83-84. An indictment was laid against the company by the Crown officers in Victoria, and the jury convicting, the trial Judge, Walkem, J., imposed a fine of \$5,000 upon the defendants. Upon appeal to the full Court in British Columbia, the conviction was affirmed, upon the ground that the section quoted (then s. 252 of the Criminal Code, 1892), applied to a corporation, that an indictment rightly lay against the defendants on the facts, and that, as the corporation could not be imprisoned, a fine was rightly imposed. The case in the Supreme Court of British Columbia is reported in 3 Can. Crim. Cas. 523. The matter was then taken to the Supreme Court of Canada, where the learned Judges in that Court considered the question raised, and in doing so cite from former cases in England. The result is stated by Mr. Justice Sedgewick, p. 84: "It has long been settled that they (i.e., corporations) are liable to indictment for nonfeasance, or for negligence in the performance of a legal duty. It was not till 1846 that

ce or active negligence was deter-
 like proceeding." Page 86: "It is
 ration can render itself amenable to
 ts resulting in damage to numbers of
 ivasions of the rights or privileges of
 detrimental to the general well-being
 te. . . . A public franchise was
 nts to maintain and operate a railway
 ints. . . . Having once accepted
 were under an obligation to exercise
 nce in the performance of their cor-
 g themselves out . . . as public
 nd to carry their passengers safely.
 ually bound to see to the safety and
 loyees. Whether the persons alleged
 have been killed were employees or
 pear, but whether passengers or em-
 efendants were under an equal obli-
 e offence committed was an offence
 ndividual right or against people in
 , as against the public at large, and
 interest, indictable." And at p. 88:
 in their charge and under their con-
 n, a railway the running and opera-
 precaution or care must necessarily
 an life. They were therefore under
 ecautions against such danger. They
 The anticipated event occurred, and
 ponsible for it." Page 90: "It is
 alleged in the indictment would be
 indictment for manslaughter against
 offence alleged here is not man-
 negligence in the discharge of duty."

largely from this case because it is
 the defendants maintain a railway,
 s their duty to so maintain it that an
 ough; they disregard that duty; the
 ened (that such an event was to be
 —it is notorious that but the other
 ce took place in a city in Ontario,
 s of life)—"they are criminally re-
 it makes no difference that the un-
 n employee. No doubt, also, in this

case, there may be some one person—perhaps more than one—who is guilty of personal negligence, and therefore equally liable to an indictment—and for manslaughter.

Were then the law in the condition in which until very recently it was believed by many to be, this might prevent my approval of the proposed settlement. It has long been considered "established as the law . . . that where an injury amounts to the infringement of the civil rights of an individual and at the same time to a felonious wrong, a civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted:" per Cockburn, C.J., in *Wells v. Abrahams*, L. R. 7 Q. B. at p. 557; and this was considered "a very wise and some rule, tending to prevent the composition of felonies under pretence of seeking remedy by action." As is said elsewhere: "The policy of the law requires that before a party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before a criminal tribunal, in order that the justice of the court may be first satisfied in respect to the public offence:" Lord Ellenborough, C.J., *Crosby v. Leng*, 12 East 413.

So far was this rule carried that in some cases, upon appearing at the trial that a felony had been committed in respect of the subject matter of the action, the Judge nonsuited the plaintiff, as in *Wellock v. Constantine*, 2 H. & C. 146; or, if he refused to enter a nonsuit, a writ of *habeas corpus* was ordered by the full Court, as in *Livingstone v. Massey*, 23 U. C. R. 156. See also *Topence v. Martin*, 10 U. C. R. 411; *Reid v. Kennedy*, 21 Gr. 86; *McDonald v. Ketchum*, 7 C. P. 485; *Williams v. Robinson*, 20 C. P.

And in our Courts, so late as 1885, in *Taylor v. McLaughlin*, 8 O. R. 309, it appearing that a prosecution had been brought against the defendant criminally, a civil action in the same cause was stayed until the criminal charge was disposed of.

But exceptions were found to the rule, as, e.g., it was held in *Regina v. Reiffenstein*, 5 P. R. 175, that the rule had no application to a case to which the Crown is a party.

As regards the existence of the rule, there does not seem to be any doubt, but the enforcement of it is a difficult question; and this has been the subject of judicial decision binding upon me. In *Wells v. Abrahams*, L. R. 7 Q. B.

arely up. The plaintiff endeavoured to the security of some jewelry. Upon the a package alleged by the defendant to was handed back, and upon this being afterwards part of the jewelry was found action brought resulted in a verdict for trial was moved on the ground (amongst dence tended to disclose a felony. The l that though there was ample authority the rule spoken of, the trial Judge was ues on the record, and that he was right ited the plaintiff. The authority of this a questioned.

nt motion is not a trial, I think I am t to the decision just cited, as though ore me at nisi prius. Whether the rule a case under Lord Campbell's Act, or not called a felony (now that the dis-felony and misdemeanour is abolished); t that a servant of the defendants is or manslaughter, and, therefore, a "felony" mitted, though not by the defendants, e to apply, are all questions interesting I need not here consider.

therefore, is approved.

y of the Crown, if so advised, to prose-ffences against the public at large," as has been held to be, by the Supreme part of my judgment will be sent to the or such action against the company or cer thereof as may be considered justi-

is said, took place at Fire Hill, Nipissing erior).

tionment, the stepson, a young man of erously asks that the share to which he e given to his mother and sister. He is I think it better that he shall have the onally handing some of the money to ning full age; and shall not, therefore, e sum to the mother and sister.

I think the widow should receive a very substantial of the amount.

The division will be as follows:—

To the plaintiff Susan M. Villeneuve....	\$1,250 00
Lavan Ferguson	318 58
Mary Ferguson	750 00

In all\$2,318 58

The infants' shares will be paid into Court.

The defendants also are to pay to the plaintiffs' solicitor the sum of \$130 for costs, out of which are to be paid the costs of the official guardian of appearing upon this motion.

A sum of \$100 per annum will be paid out (with the privity of the official guardian) to the widow for the education and support of Mary Ferguson, such sum to be paid out of the sum to which Mary Ferguson is entitled, and such payments to be for 4 years.

Note.—Counsel for the defendants, after this judgment had been delivered, appeared before RIDDELL, J., and stated that he had not intended to admit more than that the cause of the accident was a "defect in the condition of the works," etc., of the defendants, for which they were liable under the Workmen's Compensation for Injuries Act.

Of this RIDDELL, J., forthwith notified the Attorney General.

JUNE 28TH, 1901

C.A.

GREEN v. GEORGE.

Judgment—Issue as to Validity of Default Judgment—Motion to Set aside Judgment after 15 Years—Service of Writ of Summons—"Signing Judgment"—Sufficiency—Forfeiture of Judgment—Special Indorsement of Writ—Price of Writ Sold—Stated Account—Interest—Nullity of—Irregularity—Setting aside Judgment—Terms.

Appeal by plaintiff from order of a Divisional Court. O. W. R. 787, 13 O. L. R. 189, affirming judgment of RIDDELL, J., 8 O. W. R. 247.

rd by MOSS, C.J.O., OSLER, GARROW,
ITH, JJ.A.

eCrea, Sudbury, for plaintiff.

endant.

was an issue directed by the Master
plication made by the defendant on
et aside a judgment entered on the
n action brought against him by one
deceased, and now revived and con-
George's widow and administratrix.
ue was whether the defendant in that
the issue and hereafter referred to
titled to have the judgment set aside
trial the plaintiff failed on all the
e notice of motion and in the order
grounds for vacating the judgment.
een duly served with the writ in the
cation as to the service was proved;
d and entered in fact by the proper
ith the Rules in that behalf; and as
the defence to the action, the trial
greement relied upon had not been
be found, in my opinion, with the
r with the judgment of the Divisional
ny of these particulars.

plaintiff took the further objection
tion had not been specially indorsed
opponent to sign judgment on de-
nder Rule 245 of the Consolidated
ground was not specified in the
in the order directing the issue.
ere nullity by reason of the alleged
ent, it may be that the ground
ral objection "on other grounds ap-
's affidavit and the exhibits therein
e objection can be put on no higher
regularity, the plaintiff ought not to
raise it at the trial. in the face of
e first of which provides that an ap-
proceedings for irregularity shall be
ble time, and the second, that a no-

tice of motion to set aside proceedings for irregularity specify clearly the irregularities intended to be complained of, and the several objections intended to be insisted on.

I do not think that the judgment was a nullity. On the claims indorsed upon the writ, namely, the claim balance due to the plaintiff on account for goods sold delivered, rendered to the defendant and admitted by him to be correct—in short, for an amount due upon an account stated—was properly the subject of a special indorsement; the other claim was a charge or claim for interest, which was not being shewn or stated to be payable under contract by statute, was merely an unliquidated claim for damages in the nature of interest, and therefore recoverable as damages. The case was thus one within the exact terms of Rule 711 of the Rules which came into force on the 1st of September, 1888, in which the writ was specially indorsed for a liquidated claim and for damages, and in which, on the plaintiff's non-appearance, the plaintiff in the action was entitled to enter final judgment for the former and interlocutory judgment for the latter. Instead of doing so, however, he entered judgment for the whole, not only for the debt, but for the sum claimed as interest thereon. Such a judgment, had it been attacked within a reasonable time, might, in my opinion, have been amended, inasmuch as one part of the claim was properly the subject of a special indorsement, and, therefore, of a final judgment on non-appearance, the only fault to be found with it was that it was signed for too much. The plaintiff was not bound, that I know of, to have signed interlocutory judgment for or to have pursued the residue of his claim. His omission to do that could not have affected a judgment properly signed for the debt, and which the writ was rightly specially indorsed.

The effect of Rule 711 is concisely stated by Street J. in *Hollender v. Ffoulkes*, 16 P. R. 175, and it was fully considered by this Court in *Solmes v. Stafford*, ib. pp. 264, 271. In both cases the difference between a judgment on default of appearance, to which the Rule did apply, and a motion for summary judgment after appearance, under Rule 739, to which it did not, is pointed out. I have found no case by which we are bound—I may say no case—decided while Rule 711 was in force, which would compel us to set aside that such a judgment as was here entered was a nullity, and therefore not amendable. Conceding that it was irreg-

the plaintiff was, nevertheless, in my opinion if not both of the Rules 311 and 312, from taking the objection at the time, because he did not rely upon objections at the time, but tried out the merits of his alleged case. The learned trial Judge, and the Divisional Court, entertained the objection, giving the plaintiff a further opportunity to put in a defence already found against him. They were at liberty to impose and that they did impose the reasonable terms which the defendant refused. I would dismiss the appeal, and I thought right again to give the plaintiff an opportunity to pay the costs below and of the appeal.

Now, and MACLAREN, JJ.A., concurred.

Assented, for reasons stated in writing.

JUNE 28TH, 1907.

C.A.

STEAMBOAT CO. v. MacKAY.

*Navigation—Waters—Hamilton Bay
Wharf on One Side of Slip—Derogation
Slip so as to Prevent Access to Wharf
of User at Time of Grant—Admissi-*

ents from judgment of MABEE, J., 7

rd by MOSS, C.J.O., OSLER, GARROW,
DITH, JJ.A.

and J G. Gauld, Hamilton, for defend-

, and E. H. Ambrose, Hamilton, for

Moss, C.J.O.:—The plaintiffs' claim is for an injunction restraining the defendants from obstructing the plaintiffs in mooring their steamboats at their landing place on the westerly side of wharf premises owned by the plaintiffs, situate on the east side of the line of James street produced into the waters of Hamilton Bay; and also restraining the defendants from mooring or permitting to be moored vessels on the easterly side of wharf premises owned by them, situate on the west side of the line of James street produced thereby obstructing, as it is alleged, the access of the plaintiffs' steamboats to their landing place at the plaintiffs' wharf premises.

The plaintiffs found their claim upon a conveyance dated 29th November, 1888, made in pursuance of the Act respecting short forms of conveyance, by the defendants to the plaintiffs. Prior to the making of this conveyance, the defendants were the owners of certain parcels of land on James street, a public highway in the city of Hamilton, and of portions of certain water lots in front thereof and extending into Hamilton Bay, the waters of which are navigable.

The defendants' parcels of land and water lots were situated upon each side of the line of James street produced, and they had constructed on each side wharves which they used in their business as wharfingers, forwarders, and carriers of freight and passengers.

In the year 1887 the plaintiffs and defendants entered into an agreement whereby the defendants agreed to furnish suitable accommodation at their wharves at the foot of James street for three steamboats owned or leased by the plaintiffs, and running from the wharves to points on Hamilton Bay and Lake Ontario; and they also agreed, so far as they could, to give no other person or company, firm or steamboat, the right to use any of their said wharves for the purpose of steamboats running on Hamilton Bay and Lake Ontario, for excursion or regular passenger-boat business, but if obliged to do so, would make charge against such company or steamboat, and account for one-half to the plaintiffs. There are also provisions in the agreement for regulating the user of the wharves, for the payment of a rent and other charges, and for the duration of the arrangement for 3 or 5 years as expressed in the agreement.

During the season of 1888 the plaintiffs and defendants used the wharves under the terms of the agreement, but

plaintiffs used the wharf on the east side for the landing of passengers and freight, although there was nothing to that effect in the agreement.

The agreement of the conveyance of 29th November 1888 was treated by all parties as at an end, and no other charges were paid under it, and in it came to an end on 1st May, 1889.

The agreement with the making of the conveyance of 29th November 1888 was entered into between the plaintiffs and defendants, bearing the same date, and that the defendants own the wharf on the east side on which they are carrying on their business as carriers of freight and passengers, and the plaintiffs are the owners of the wharf on the west side of James street, described in the agreement, and are carriers of passengers and freight between Toronto, Hamilton and Niagara, and steamboats used for the said purposes, and the plaintiffs are also owners of other wharves on the east side of the agreement, and that it had been the intention of the parties, for the better protection and benefit of the plaintiffs, to enter into the conveyance of 29th November 1888, after set forth, the parties mutually agreed that for 20 years the plaintiffs should not transact at any of their wharves between Hamilton and Toronto, or at any other wharf, or at any intermediate ports, or at any wharf belonging to others to call at, or to do any such business at, any of their wharves, on a proviso that the defendants shall not transact and permit others to transact business at their said wharves between Toronto and Niagara and to transact their freight and other business for their company, free from all control or interference of the plaintiffs.

In the year of 1888 the steamboats which the plaintiffs carried on the business of carrying passengers from Toronto and Niagara, and intermediate points, were the "Godjeska". During the same time the

defendants were operating a certain number of steamboats in passenger and freight trade between Hamilton and points on the lakes other than Toronto and Niagara; and it appeared that during that year, and for some years after, the steamboats used by the defendants were of such beam as not to interfere, when lying at the defendants' wharf on the west side of James street, with the plaintiffs' steamboats lying at their wharf on the east side of James street. Within recent years, however, the defendants have become owners of a number of steamboats of greater beam, and the effect is that when they are lying at defendants' wharf on the west side of James street, there is no room in the slip between plaintiffs' and defendants' wharves for either plaintiffs' steamboats to come in and lie at plaintiffs' wharf on the east side of James street.

The plaintiffs' contention is, as expressed in the statement of claim, that the grant by the defendants to the plaintiffs of the lands and water lots described in the conveyance of 29th November, 1888, was upon an implied condition that the defendants should not derogate from the purposes of their grant by interfering with the plaintiffs' enjoyment of their premises by taking their vessels into the slip at all times without any hindrance or prevention on the part of the defendants by reason of their steamboats lying or being tied up at the defendants' wharf on the west side. The plaintiffs do not claim, in fact they disclaim, any case of unreasonable user by the defendants of the slip between the wharves. Their claim is of a right founded on the grant.

The trial Judge held that the plaintiffs were entitled upon the terms of the conveyance, to use the waters of the slip as an approach to their wharf in the manner and to the same extent as they were used by them under the former agreement, and as they used the waters at the time of sale by the defendants to the plaintiffs of the premises.

The judgment perpetually restrains the defendants from using, or permitting to be used, the waters of the slip lying between the wharf premises of the plaintiffs and those of the defendants respectively, in any manner that prejudicially interfere with the user by the plaintiffs of the waters of the slip as an approach to their wharf premises on the westerly side of the slip, by the steamboats Mac

any other steamboat of no greater size
for either of them.

, therefore, turns on the effect of
regard to all the facts and circum-
stances at the time when it was made.

at the trial that during the nego-
tiation in the conveyance and agreement
between the plaintiffs were desirous of ob-
taining an express right to the exclu-
sive use of their steamboats at all times when
needed for its use for that purpose; but the
defendants agree to that, giving as a reason the
fact that a canal which was in progress at
the time of completion; and that the defend-
ants intend to build or acquiring larger
boats, and would need the use
of the water. The plaintiffs were fully aware of
the reasons of the defendants and their reasons for it.

On the plaintiffs seem to have been
no objection as to the rights of the parties
as to the slip; and the formal judg-
ment drawn up under the same impres-
sion necessary to say that the waters of the
river neither party has any pro-
prietorship. Their rights therein are no greater
than those of the public. They are entitled to
use the abutting properties to the waters
of the river on them they are entitled, together
with the public, to make a reasonable use of
the waters for pleasure, but they have no right
to exclude others of the public, or to
use the waters as against one another. Their
rights respect only of their wharves and
the slip, and of these they can make
such use as they see fit, or as their business
requires, in a legal way.

They further contend that by reason of the
fact that under the circumstances already
mentioned they are entitled to control the defendants' use of
the waters in a manner not ordinarily exercisable by
the owners of land over that of another.
No special right has not been awarded to them in
this respect, is that the defendants are ob-

liged to make use of their premises for their business subordination to the use made by the plaintiffs of premises for the purposes of their business.

It is trite law that the grantor is not permitted to derogate from his own grant. But that rule does not confer upon a grantee a right to insist upon his grantor limiting the use of premises retained by him to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant to the knowledge of the grantee.

The claim as made and allowed in this case certainly seems to extend very far the rule of implied grant or obligation not to derogate from a grant, and even if there is nothing in the circumstances existing at the time of the actions of the parties connected with the making of the conveyance and contemporaneous agreement, it would be a matter for consideration whether there should be implied into an ordinary conveyance under the Act respecting Conveyances forms of conveyances and such far-reaching effect. The language of sec. 12 of R. S. O. ch. 119 does not appear to lend assistance to the plaintiffs' contention. None of the words there used seems applicable to the right which is claimed under the conveyance in question. The language of the conveyance may properly pass easements and privileges legally appendant and appurtenant to the property conveyed. But it cannot be contended that the temporary right which existed solely under the agreement of 28th December, 1891, came within the character of an easement or privilege legally appendant or appurtenant to the property. Certainly it was a special right or easement or privilege in respect of the use of the navigable waters of the slip was appendant or appurtenant to the property. The conveyance does not purport to grant *eo nomine* the pier or dock, nor is there any mention made of it. There is simply a grant of a portion of land and of portions of three water lots, forming a parcel described by metes and bounds. Does such a grant carry with it an implied obligation on the part of the defendants to conduct their business in such manner as to enable the plaintiffs, so far as the defendants are concerned, to use the slip for the purposes of their two steamships at all times when they require it? In dealing with this question the whole facts and circumstances must be taken into consideration, including the plaintiffs' knowledge

ons as to the use of the retained

The provision in the contempor-
y to the defendants the liberty to
ers to transact through passenger
s between Hamilton and all points
agara, and intermediate points, and
and other business free from all
of the plaintiffs, is important. It
nowledge of the defendants' intention
arves to the fullest extent, except
ness between Toronto and Niagara
is concerned. Subject to the excep-
the language of the instrument, at
business with such vessels as they
ion as to size or tonnage.

parties had in mind, no doubt, what
parent to any persons engaged in
ey were engaged—that probably in
to the enlargement of the canals,
ut in commission for through trade
oth parties must be considered as
to use the navigable waters in the
There is nothing in what took place
ants intended or that the plaintiffs
dants intended to prosecute their
according to the best methods,
a and use of improved freight and
ording as the advance of trade
n that direction. There is, on the
that the plaintiffs understood that
he defendants to so carry on their
nothing else there is the proviso in
reement which goes far to displace
restricted use by the defendants of
This, coupled with the admission
who was concerned in the negotia-
en the parties, shews the plaintiffs'
nding of the defendants' intentions.
ge and understanding they accept
eing so, there is no good ground for
implied obligation of the kind now
ne conveyance by the defendants of
plaintiffs now own and are making
s.

If the rights of the parties to the use of the slip are to be dealt with, it must be by ascertaining whether there is any unreasonable use by either party of the waters forming a public highway between their respective properties. That question the plaintiffs did not enter upon and were not willing to enter upon at the trial, resting their case entirely upon their rights under the conveyance.

As these rights do not carry the absolute rights which the judgment has granted in this case, the appeal must be allowed, and the plaintiffs' action be dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 28TH, 1907.

C.A.

HARRIS v. LONDON STREET R. W. CO.

Negligence—Street Railways—Injury to Motorman—Collision with Another Car—Failure of Motive Power—Stranded Car—Neglect to Signal Approaching Car—Disobedience of Rules by Injured Motorman—Actual Cause of Injury—Contributory Negligence—Finding of Jury.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of a jury, in an action for damages for personal injuries.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., for defendants.

G. T. Blackstock, K.C., for plaintiff.

OSLER, J.A.:—The plaintiff was a motorman in charge of a car running upon the defendants' line of railway, and on the night of 23rd August, 1906, met with the injuries, the subject of the action, in a collision between that car

and another car of the defendants, which had preceded it on the same track, and which had been stalled or "stranded" there in consequence of the stoppage or failure of the motive power. The negligence charged and relied upon was the omission of the defendants, or their servants in charge of the first car, to notify or warn those in charge of the car following it of the danger which might be caused by the stoppage of the former.

The facts are simple. It may be conceded that there was evidence for the jury of negligence on the part of the men in charge of the first car, in failing to signal the following car of its situation, but the important question in the case is whether the plaintiff's own neglect in disobeying a clear and positive rule applicable to the condition in which he found himself, was not the cause of the collision, rather than the omission of the motorman or conductor of the other car to warn him.

That rule, with which the plaintiff was perfectly familiar, was one of a "code of rules for the government of conductors and motormen" of the company, and provides: "Rule 212. Power off line. When the power leaves the line, the controller must be shut off, the overhead switch thrown, and the car brought to a stop. The light switch must then be turned on, and the car started only when the lights burn brightly."

The accident happened about 9.30 on the evening in question. At this time the first car had been stationary for some 10 or 15 minutes. It was about 300 feet west of a place on the overhead wires where there was what is called a circuit breaker. From that point west the power was off, and of course the lights out along the line, by reason, as it seemed, of a broken wire. Whether it was off at the time that car passed the circuit-breaker, and the car had rolled along from thence to the place where it was standing, or whether it went off after the car passed the circuit-breaker, is unknown. The power had been weak and intermittent for some little time before the plaintiff's car arrived at the place referred to, but there, according to the plaintiff's own evidence, the power went off and the lights went out. He did act upon the rule so far as to shut off the controller, and thus prevent the action of the power upon the car on its return to the line, until he opened the controller, but, instead of bringing the car to a stop by applying the brakes, he allowed it to roll on by the momentum it had acquired

on its journey, until it was stopped by collision with stationary car in front of it. He said that he could have brought the car to a stop by the application of brakes if he had seen the other car, and the evidence admits of no doubt that at the rate he was going and within the distance which that car was from the circuit-breaker, he could have done so.

Under these circumstances, it appears to me that there is no escape from the conclusion that plaintiff was the cause of his own injury, and that there was nothing to justify the finding of the jury, in answer to the 4th question, that the negligence and breach of duty did not cause or so contribute to the accident, that but for such neglect or breach of duty it would not have happened. The rule was made to provide for the exact situation, and for the obvious purpose of preventing accidents, either to the property of the defendant or the persons of their servants, from a car continuing in motion when the power left the line. It was a plain and sure guide for the plaintiff. His duty was to bring the car to a stop, not to reason about possibility of the power returning to the line or the lights soon beginning to glow. Had he acted in compliance with the strict requirement of the rule, there would have been no collision, and if he had been so, the appeal must be allowed and the action dismissed with costs, if the defendants ask for them.

MEREDITH, J.A., gave reasons in writing for the above conclusion.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

THE
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JUNE 28TH, 1907.

C. A.

MARTIN v. CHISHOLM.

*Right of Way to Burial Plots—Interference with—
Plan—Title to Lots—Injunction.*

Appeal from judgment of CLUTE, J., at the
Court of Session.

Appealed by MOSS, C.J.O., OSLER, GARROW,
and DUTH, J.J.A.

For appellants, J. C. Brown, Williamstown, for

The appellants in this case, claiming to
be entitled to two burial plots in a small
piece of ground belonging to St. Andrew's Church, Martintown,
County of Marlborough, in the county of Glen-
gow, to restrain the defendants from proceeding
with the extension or enlargement of the church
yard plan which had been determined upon.
The ground upon which the right was
proposed work would interfere with
the right of way to the burial plots, which, the
appellants shewn on a plan of the churchyard and
situate, in the shape of a roadway
between the north wall of the church building
and the two burial plots. The plaintiff

McMartin claims to be entitled to plot No. 62, as the ter and one of the heirs and next of kin of one Ar McCallum, deceased, who is said to have acquired it year 1873. Mrs. McMartin has been for 11 years a r of the city of Ottawa, and has ceased to be a member congregation. Her only brother has been absent from country for over 23 years, and apparently there is ver communication between them. She testified that 6 ments filled the plot, and that 6 members of her f family were already buried there. So far, therefore, claim is concerned, a way of 15 feet width is not re for the only purposes for which it would be require for access to and fro for visiting the plot and what was necessary to maintain and keep it and the ments on it in repair. And any title that she shew not appear to extend beyond that, even if it goes so fa Moreland v. Richardson, 22 Beav. 596, 24 Beav. 33; Belson, 10 O. L. R. 686, 6 O. W. R. 462. It is qu parent on the evidence that if she had been left to h she would not have considered it necessary to take pr ings to restrain the building operations.

The plaintiff Graham claims to be the owner of p in which 4 interments have been made. He is appa still a member of the congregation, but one of a n who are dissatisfied with the action of the congregat forming a union with another body known as Burns C congregation, involving amongst other things the pr enlargement of the church building.

His rights, and whatever rights his co-plaintiff may are derived under documents which are not produced. have been lost or destroyed, it is said, but a copy of the in which they issued was proved. The documents p to be signed by the chairman and secretary of the tr of the church. They are not under seal, and conta words of grant of the soil, or of inheritance, or any lan that goes beyond a license or privilege of interment plot named. They are in form certificates of the pu of numbered plots in the graveyard surrounding the c according to a map of the same belonging to the tr and state that the purchaser is entitled to the plot, s to the rules and regulations which have been or may after be passed by the trustees.

was not intended, and the certificate convey any title to the soil. Neither or otherwise, assure a right of way any other right of way, save such as for the purpose of making use of es for which it has been procured.

plaintiffs that the reference in the which indicates the wide space, or undertaking that there was a way it would be maintained.

in question was never laid out as a of the churchyard surrounding the with grass in the summer. But it exhibition of a map or plan or a on a sale and purchase of freeholds, ct to maintain ways or roads shewn sentation that they will be made or only necessary to refer to Feoffees ow. 301, where Lord Eldon remarked perfectly wild to say that the mere s sufficient to form a building con- ce of Lord Cottenham in Squire v. 59, at pp. 478, 479. Reference may Specific Performance, 4th ed., p. 407, Toronto, 11 A. R. 416 (affirmed in S. C. R. 172), where a number of the estion are referred to.

he trial Judge, the evidence makes to this particular churchyard there without any means of access save by

ge given is subject to the rules and be made by the trustees, and it is ntended to assure to the purchasers the continuance for all time of the ch wall, as then existing, and the thing more was intended to be given, an an easement granted and taken, as the altered circumstances of the ghbourhood might render necessary. tees to make rules and regulations extend to preventing access to the

plots in a reasonable way for the purposes for which they were procured: *Ashby v. Harris*, L. R. 3 C. P. 523.

This reduces the matter of this appeal to the question whether what is proposed to be done interferes unreasonably with the right of the persons owning or entitled to the plots in question. And upon the evidence, and having regard to the size of the churchyard, the situation of the church building, and the position and means of access to other plots, there is no good reason for interfering with the finding of the trial Judge. The action of the congregation was taken in good faith, under the belief, reasonably entertained, that the circumstances of the union and the necessity for extension and enlargement of the church building called for the performance of the work which had been decided upon after full consideration. And there is really no fair ground for apprehension that the plaintiffs will be deprived of such reasonable means of access to and from the plots as they are entitled to.

The appeal must be dismissed.

MACLAREN and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

OSLER and GARROW, JJ.A., also concurred.

JUNE 28TH, 1907.

C.A.

FRAWLEY v. HAMILTON STEAMBOAT CO.

Master and Servant—Injury to Deck-hand on Lake Steamer—Seaman—Negligence of Mate—Findings of Jury—Workmen's Compensation Act.

Appeal by defendants from judgment of CLUTE, J., after trial with a jury, awarding plaintiff \$1,300 damages, upon the jury's answers to questions submitted to them.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A.

J. E. Jones, for defendants.

A. M. Lewis, Hamilton, for plaintiff.

Moss, C.J.O.:—Plaintiff was in the employment of defendants as a deck-hand on their steam vessel "Macassa," and, while engaged in assisting to bring her alongside the pier in the Burlington canal, his foot was cut off by a hawser or check line, in which it became entangled. The hawsers are used in bringing the vessel to a stop alongside a pier or dock. There is one on each side forward near the bow, and also one on each side near the stern. They are operated from the promenade deck, and when ready for use are coiled neatly near the rail by the side of timber heads used in the operation of checking the vessel as she approaches the pier or dock. When it is desired to bring her up to a pier or dock, the engines are stopped at such a distance as will enable the vessel to come up by her momentum. She is headed so as to bring the bow in close to the piers and enable two of the hands to get ashore, to attend to the hawsers, one attending to the bow and the other the stern hawser. Their business is to place the loop of the shore end of the hawser they are in charge of, over a post or pile on the piers or dock, as directed by the master or others who have in charge the management of the vessel ends of the hawsers.

On the occasion in question, the management of the stern line or hawser was in the mate's charge, plaintiff and another man handling it under his directions. As the vessel approached the Burlington piers, the vessel's speed was slowed down, and all three went up to where the line was on the promenade deck. There were a large number of passengers on board, and the deck was very crowded in the vicinity where the line lay as well as everywhere else. It was part of plaintiff's duty to handle, under the mate's direction, the line while it was running out after the loop of the shore end had been placed over the post on the pier. It was the mate's duty to throw the shore line to the man on the pier, and see that it was placed on the proper post. But before doing that it was his duty to see that the line on board was properly coiled so as to run out freely when the time came, and that passengers were made to stand back so as to be free of the coil of the line as it went out. As the vessel came in towards the pier, and he saw that the head-line had been landed, the mate threw the stern line; it was taken by the man on the pier and passed over the post. Plaintiff passed his end over the timber heads for the purpose of checking the vessel. Owing, as he says, to the speed at which she

was still moving, he was thrown or dragged toward timber heads, and his leg became entangled in the line the result already stated.

The mate swore that, before going to the stern to assist in throwing the line, he gave orders to have it properly coiled, and that he saw that it was done and the passengers moved away. There was evidence, on the other hand, that the coil was greatly disarranged and lying about loosely, no orders were given, and that nothing was done to put it into proper shape.

The trial Judge properly ruled that plaintiff's case would only lie under the Workmen's Compensation Act. He put questions to the jury framed with reference to the provisions of that Act.

The jury found that defendants were guilty of negligence causing the accident; that it consisted in the mate instructing plaintiff to coil the rope properly, and in telling the passengers to displace the coil of rope, causing the coils to be scattered. In answer to a question, "Was plaintiff's injury caused by the negligence of any person other than the defendants' employ who had any superintending authority trusted to him while in the exercise of such superintending authority? If so, to whom?" they responded, "Yes; the mate." In answer to a question, "Was the plaintiff's injury caused by the negligence of any person in the service of the defendants to whose orders the plaintiff, at the time of the accident, was bound to conform and did conform? If so, whom?" they replied, "Yes; the mate." To the question, "Could the plaintiff by the exercise of ordinary care have avoided the accident?" they answered "No."

For defendants it was argued that there was no sufficient evidence to support these findings. But the most that can be said is that there was a conflict of testimony, and that, while, as to some of the findings, if the jury had chosen to adopt the contrary view, it would have been well sustained, it cannot be said that there was not evidence on which they might reasonably come to the conclusion that they did.

The testimony of the captain and mate makes it clear that it was the latter's duty to see that the line was properly coiled, and that the passengers were kept away so as not to interfere with it. As already mentioned, the mate swore that he did so, but in this he was contradicted, not only by the plaintiff but by others.

that after he had thrown the line to let it run and not to check. Plaintiff received any such order, and says that, on instructions, as soon as he saw the rope on the pier he proceeded to check by the timber heads. There was evidence that was very considerable, and plaintiff asked or dragged towards the timber that the line was not properly coiled, but, being scattered on the deck, there would be getting entangled and being unable to do that is, no doubt, the conclusion that

in support of the appeal Mr. Jones, Workmen's Compensation Act did not say that plaintiff came within the class, *Wey v. Pinkney*, [1892] 1 Q. B. 58, he subsequently abandoned the point, on the face of sec. 2, sub-sec. 3, of the Act. It is sustained. With costs.

TH, J.J.A., gave reasons in writing

concurring.

JUNE 28TH, 1907.

C.A.

TRIC CO. v. ROYAL TRUST CO.

*Provision for Cancellation—Right of
—“Assigns”—Lease—Partnership.*

from judgment of ANGLIN, J., 9 O. with costs an action for a declaration that defendant had broken a contract, dated 10th March 1905, between plaintiffs and one F. X. St. John. Those estate defendants were administrators of electric current to the Russell

House, an hotel in the city of Ottawa, and for damage such breach of contract. The question presented whether the subsequent occupants of the Russell House "assigns" of St. Jacques within the meaning of a pr in the contract.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, J.J.A.

G. F. Henderson, Ottawa, for plaintiffs.

J. F. Orde, Ottawa, for defendants.

OSLER, J.A.:—In my opinion, the action fails. The word "assigns" in the proviso of the agreement of May, 1902, the lighting contract, between these plaintiffs and St. Jacques, means assigns of the hotel premises under lease to him by the demise of 10th May, 1902—this, looking at the whole agreement, I am inclined to think is what it does mean—the Mulligans, claiming under a new lease to be granted to them by the owners, are claiming under St. Jacques in any way. They are not to be tenants and occupiers of the hotel under a new lease derived through St. Jacques or his representatives, and in any sense a renewal of the lease expiring on 1st May, 1907, or granted under any covenant contained in or conferred by that lease upon St. Jacques or his assigns. On the other hand, the word means assigns of the lighting contract, it seems equally clear that, except sub modo down to the date when the lease of 10th May, 1902, expired, they never became the assignees of that contract. Therefore, neither St. Jacques, nor his heirs, executors, administrators, or assigns, being owner, tenant, or occupier of the hotel, either by themselves with another or others, after May, 1907, his administrators, the defendants, were entitled by the terms of the proviso, to cancel the lighting contract which I think they have effectually done, and thus put an end to all claims of plaintiffs thereunder.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the conclusion.

MOSS, C.J.O., and GARROW, J.A., concurred.

JUNE 28TH, 1907.

C.A.

OUR CO. v. O'SULLIVAN.

Discount by Payees with Bank — Action while Bank Still Holders of Note—Note Pending Action—Failure of Action—Lien Urged in Court of Appeal—Right of Maker to Indemnify them against Note—Refused.

from order of a Divisional Court of MABEE, J., at the trial, and dismissal was brought upon a promissory note of \$5, for \$3,500, made by defendant, payable to plaintiffs on demand, with interest at 6 per cent of claim alleged that the note was for \$3,000 worth of capital stock in the company subscribed for by and allotted to defendant, the loan lent and advanced by the company to defendant. It pleaded that plaintiffs were not the makers of the note at the time of action brought, that there was an agreement between himself and plaintiffs' president and agent, of which defendant was ignorant, that he should not be called upon for the loan for 5 years.

Decided by MOSS, C.J.O., OSLER, GARROW, and EDITH, JJ.A.

and W. M. McClellmont, Hamilton, for plaintiffs, and on, for defendant.

. As regards the note, it appeared that it was accounted for with the Bank of Hamilton, and that at the same time, as collateral, the note was supposed to have been given, and when action was brought the bank were still holders of the note and shares. Plaintiffs afterwards produced it by them at the trial. It was found that possession of the note at that

time was sufficient, and gave judgment for plaintiffs, holding that it was not necessary that they should have been holders at the time this action was brought. He held that the alleged agreement to postpone payment had not made out.

Before the Divisional Court defendant again relied on the defences put forward at the trial, and by that Court judgment at the trial was reversed, on the ground that plaintiffs were not the holders of the note when the action was brought. Plaintiffs now appeal, and, while urging faintly that the judgment below was wrong on this point, contend that, inasmuch as they were liable to the bank as sureties on the note for defendant, they had the right to bring or to maintain the action to compel him to pay the bank, and to indemnify them in respect of it. The cause of action was not set up on the pleadings, and was first put forward for the first time on the appeal to this Court.

It is now, in my opinion, too late for plaintiffs to attempt to recover their lost ground. The note was outstanding in the hands of a third party when they commenced the action, and so they had no title to sue in the shape in which they launched it and in which they have presented it at the present stage. See *Davis v. Reilly*, [1898] 1 Q. B. 101, on which we understand the Court below relied.

A new trial on payment of the costs of the former trial and of the Divisional Court and of this appeal—near the costs of the action—would be but an illusory favour. Moreover, having contested the case throughout on the ground and failed, it would be, under the circumstances, unreasonable to permit plaintiffs now to set up another ground consistent with it, and one which, even if it was open to them while the bank were still the holders of the note, ceased to be a cause of action or ground of equitable claim when plaintiffs took it up and became, as payees and endorsers, entitled to sue upon it. That is now their cause of action, if they have one, and, as it is not affected by anything which has been decided in the present suit, there is no reason to interfere with the judgment.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

JUNE 28TH, 1907.

C.A.

WILSON v. DAVIES.

*Injury to Servant and Consequent Death
Master — Dangerous Employment —
Negligence of Servant Immediate Cause of
Verdict of Jury — Voluntary Assumption of*

Verdict from judgment of MABEE, J., on
Verdict, in favour of plaintiff for \$1,500, in
Verdict of John Wilson to recover damages

Verdict, K.C., and R. H. Greer, for defendant.
Verdict plaintiff.

Verdict of the Court (MOSS, C.J.O., OSLER,
Verdict, J.J.A.), was delivered by

Verdict:— . . . Deceased was employed
Verdict factory, and it was part of his duty to
Verdict drying room to the cooling room cars loaded
Verdict severally became ready for such re-
Verdict room in question was a long narrow
Verdict l tracks, each 3 feet in width, which
Verdict the north end where the loaded cars
Verdict in 10 feet or a total incline of 8 inches
Verdict the cars projected 5 or 6 inches over the
Verdict so that when the tracks were filled with
Verdict trains of cars on the east side and two
Verdict passage in the centre, but with the
Verdict all to this passage completely covered.
Verdict rear end of the drying room, separating
Verdict room, were two doors which were raised
Verdict required. Between these doors at the
Verdict passage was a post with grooves into which
Verdict fitted. Under the forward wheels of the
Verdict each track was placed a block of wood, a
Verdict length, to prevent the cars from running
Verdict doors.

When any cars were sufficiently dried and were to be removed into the cooling room, the operator would raise the sliding door at the end of the track, remove the block of wood, and when the car or cars would move into the cooling room, either by gravitation or by slight assistance, the operator would be replacing the wooden block in front of the wheels of the car which he wished to retain in the drying room, and when the car came forward to a position near the sliding door.

On the night of the accident it was the duty of the deceased to remove one or more of the cars on the east side of the centre track into the drying room. No other person was present, but some time after he was found crushed to death between the forward car of this central track and the sliding door at the end of the passage. It was evident that the car had been a short distance back from the post and the door, and that he had gone on the central or westerly side of the track to remove the wooden block. When the car came forward to a position opposite the post, there was a space of only 6 inches between the car and the post, and he was caught with his head and right arm in front of the car and post, and the remainder of his body behind them. Each car had about a ton of bricks upon it, and there were 10 or 12 cars on the track in question.

At the close of plaintiff's case, defendant moved for judgment of nonsuit; the question was reserved by the trial Judge; the case was put in evidence, and then renewed his application for judgment. The whole case was submitted to the jury, who found defendant guilty of negligence: (1) in not having sufficient clearance between the track in question and the post; and (2) in having a steeper grade than necessary. They also found that the deceased voluntarily ran the risk of danger in moving the cars in question. Of this last answer the deceased gave some explanation, which, however, did not satisfy the jury satisfactorily.

The evidence for plaintiff was very meagre. Five witnesses were examined. Plaintiff herself testified as to the earnings and family of deceased; her son-in-law testified as to the incline, the number of cars, and the method of blocking them; one of defendants' workmen (Andrews) and a car shunter from an adjoining brick factory (Timson) gave evidence, to which further reference will be made presently. While a law student who examined defendant's factory and 3 other brick factories in the neighbourhood some 6 weeks before the trial and 6 months after the accident, was

plaintiff. This last-named witness the business, and did not in any way. He found that cars in the other move by gravitation alone, as in defendant's works, about which there is no dispute. He was dangerous and negligent for the west side of the car when removing ample room for him to stand on the next line of cars, where he would be safe, and in which event the accident would have happened. No reason is disclosed or even suggested, why he should have been in an admittedly dangerous situation.

The evidence on which the jury could properly find negligence on the part of defendant or contributed to the accident. The facts of the deceased established by the defendant's own witnesses, and which was the only evidence that could properly be called contributory, which the jury might be called upon to find was the primary negligence which was the cause of the accident. There being no dispute as to the facts, and about the proper inferences to be drawn therefrom, there was nothing left for the jury to decide. See, *R. W. Co. v. Slattery*, 3 App. Cas. 411, 12 Q. B. D. 70.

The court, of opinion that there was no case for the jury, and that the action should have been dismissed on defendant's motion for a nonsuit.

Nothing in the testimony of the witnesses could possibly help plaintiff's case, and the court was justified in submitting the case to the jury. Defendant's works were constructed after modern methods; that the incline was

the usual and proper one; that the deceased was shewn instructed by defendant's engineer, when the works completed two months before the accident, that he should stand in front of the next row of cars when removing a block from the one which caused his death. The fact that the loaded cars in defendant's drying room moved more freely than those in the other factories was accounted for by the fact that they were newer and were less clogged with clay and dust. By the time of the trial, 7 months after the accident, they moved less freely, and, like the others, would not always move by gravitation alone.

The facts of the present case are strikingly like those in *Callender v. Carlton Iron Co.*, 9 Times L. R. 646, affirmed in the House of Lords, 10 Times L. R. . . . It does not appear in that case that the deceased was actually aware of the danger; in the present case the deceased could not be unaware of it, as it was quite apparent to every one, and the situation was the same during the whole of the 6 weeks that he had been doing this work since the new appliances were installed.

The situation was simply this: the block could be moved from either side of the track; on one side, where the deceased had been instructed to stand when removing a block, and where he had always previously stood, so far as the evidence goes, he would have been perfectly safe, and the accident could not possibly have happened. On the other side, where he stood on this fatal occasion, it was obviously dangerous, and no reason is given, or even suggested, for his having placed himself in the dangerous position. He knew that the car would move as soon as the block was moved, and his unnecessarily placing himself between the car and the post, in a space of not more than 2 or 3 feet, would fully justify the answer of the jury that he had voluntarily incurred the risk. It is an unfortunate case, but I do not think there is any evidence of negligence on the part of defendant that was the cause of or contributed to the accident.

Appeal allowed and action dismissed with costs. Defendant should claim the costs.

JUNE 28TH, 1907.

C.A.

AL FOR ONTARIO v. HARGRAVE.

*ases — Action by Attorney-General to
dence — Misrepresentations — Affidavit
Truth of—Evidence—Land Titles Act
nsation for Improvements — Notice —
—Appeal—Duty of Appellate Court.*

ants E. C. Hargrave and the White
m judgment of BOYD, C., 8 O. W. R.
plaintiff in an action for the cancel-
ing leases and to recover possession of
herein.

, K.C., for defendant E. C. Hargrave.
defendants the White Silver Mining Co.
C., and R. D. Moorhead, for the At-

f the Court (MOSS, C.J.O., OSLER,
MEREDITH, J.J.A.), was delivered by

ne Chancellor . . . has dealt very
He has stated at length the reasons
e reached, and agreeing, as I do, with
not propose to endeavour to add to

ssue are almost, if not wholly, matters
ained upon the evidence, documentary
e record on the appeal. In dealing
are not to overlook, upon any question
antage which the Chancellor possessed
witnesses, observed their demeanour,
ession as to their intelligence, truth-
. And further, it is to be borne in
ions of the trial Judge, upon questions
overturned unless, upon full consider-

ation of the facts and circumstances, and the fair inference to be derived therefrom, it is manifest that a wrong conclusion has been reached.

It was strongly urged for the appellants that, in dealing with the question whether there had been misrepresentations and false statements, as to the fact of discoveries to the Crown in order to procure from it the issue of leases the recall of which are the subject of this action, the Chancellor had erroneously assumed that the onus of proving the fact of the discoveries was on the defendant, whereas it lay with the plaintiff to establish that there were no discoveries in fact; that there was no legislative provision or departmental rule rendering obligatory the statement of the date of a discovery; and that it was not enough for the plaintiff to shew that there were no discoveries in December, 1904, as alleged in procuring leases; it was also incumbent on him to prove that there were not discoveries in the preceding November. In this case was to turn on this point, the plaintiff fully discharged the onus, so far as it was on him. The Crown having fallen into the error of supposing that the discoveries had been made in the month of December, and having issued leases on the basis of such alleged discoveries, could not be required to do more than shew the falsity of the statement on which its action was founded. How would the case have stood if the only evidence given in the case was the production of the affidavits of discoveries and the other material on which the Crown acted, the proof that the statements as to discoveries as alleged in the affidavits were untrue, and that there were no discoveries in December, 1904, therein alleged?

There would have been but one finding, viz., that the Crown had been deceived and misled, and that there should be a restoration of its rights.

Here, the plaintiff did shew that, so far as the alleged discoveries in December were concerned, there was no foundation for the statements. That is now virtually conceded by the appellants. And if the case stopped there, the case would be without any answer to the action.

But they set up that, admitting it to be true as alleged in the affidavits that there were no discoveries in December,

h discoveries in the month of No-
s in respect of these that the appli-
he issue of the leases, and that the
coveries in December was a mistake.
be established by the appellants, in
us was upon them. And it would be
ose of it, to find that the appellants
establish it, that the evidence upon
prove the fact of discoveries in No-
lied on, and was insufficient to con-
came to this conclusion, not merely,
cting upon a rule of evidence as to
upon the whole testimony, and
he facts and circumstances. Viewed
to the question of onus, the testi-
Chancellor's conclusions.

he circumstances connected with the
pplication for the issue of the leases
ed by and through the intervention
rave and his solicitor, and the fact
ued to him along with his co-defend-
utherford and Williams, there is no
that the appellant Hargrave stands
ger position as purchaser for value
ndant in the action, than any other
directly with the Crown for the issue
one of the parties named as lessees.
this was done at the suggestion of
lands department, and was not the
at that does not alter the fact that
ents issued to him. He has never
a person who could, under the an-
g the defence of purchaser for value
aintained that character, even if the
inst the Crown, a point which it is
nine in this case.

sue of the leases he had necessarily
e affidavits and other material laid
and it was obligatory upon him to
ey truly represented the facts. Nor
of this position by endeavouring to

cast the duty of protecting him upon the officials department.

Nor do the provisions of the Land Titles Act on reliance is placed assist the appellants, for the reason put out by the Chancellor, that the attack of the Crown on the impeached instruments was made while the title remained vested in the parties to whom the grant was made, and before that no title had passed to a purchaser for value.

The case of Attorney-General v. Goldsborough, 15 B. 639, affords no assistance. The decision of the Appeal Court turned altogether upon a special statutory enactment which has no counterpart in our Act.

Upon consideration of the whole case, I think the appeal fails, and should be dismissed with costs.

JUNE 28TH

C.A.

TOOLE v. NEWTON.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance — Oral Understanding as to Plaintiff's Release of Claim for Dower—Addition to Written Contract of Words "if in his Power to do so"—Terms of Judgment for Conditional Specific Performance.

Appeal by defendants Newton and Wright from the judgment of a Divisional Court affirming (with a variation as to costs) the judgment of BOYD, C., at the trial, in favour of the plaintiff in an action for specific performance of an alleged contract for the sale to plaintiff of a lot of land in the township of Kenora, of which defendant Newton was mortgagor and defendant Wright assignee of the mortgage.

The Chancellor held that plaintiff was entitled to judgment for specific performance, with a reference to the Master to settle the proper amount of purchase money, making deductions for taxes and any incumbrances which might exist, and to adjust what should be paid as decedent's

ate dower of one Mrs. Gore, if she
at the agency of one Cummins for
s clearly established.

rd by MOSS, C.J.O., OSLER, GARROW,
, J.J.A.

, for defendant Newton.

or defendant Wright.

, for plaintiff.

is being an action for specific per-
k, clear upon the authorities that it
ant to resist the relief sought on the,
a agreement of which specific perform-
truly represent the agreement which
into.

pbell, 17 Gr. 592, Mowat, V.-C., thus
): "It is not of every legal contract
grant specific performance; and it is
written agreement happens to omit a
parties understood to form part of the
t to be in some other material respect
agree to and understood that he was
equity will not enforce the written
as they hold it to be against conscience
o take advantage of the omission or
e rule that parol evidence is admis-
sion or mistake by way of defence to
ormance." In Wood v. Scarth, 2 K.
lor Sir W. Page Wood said (p. 42):
not be compelled by this Court speci-
agreement which he never intended
as satisfied the Court that it was not
s well established. Perhaps no case
principle than Marquis of Townshend
328, which shews both that an agree-
specifically performed by this Court with
, on the other hand, that this Court
e performance without such variation
defence."

stimony of Cummins and McGillivray
myself satisfies me that it was part of

the agreement for the sale of the lands in question, and of the terms upon which it was signed, that it was not to be binding on the defendant Newton, unless he could procure a release of Mrs. Gore's claim for dower for the sum of \$100, or make title without her concurrence, and that the words "if in his power to do so" were written into the agreement for the purpose of expressing that understanding.

The plaintiff's testimony at the trial leaves little doubt as to this. For some time before the "option" or agreement of 16th May, 1905, on which the plaintiff is now suing, was signed by Cummins, there had been negotiations between him and the plaintiff for the purchase of the premises in the course of which there had been discussions about Mrs. Gore's claim. An attempt had been made, through McGillivray, who was acting as solicitor for her as well as for the plaintiff, to get her to release her claim on payment of \$100, but she had refused, and claimed \$500.

The following is the letter written by Cummins to the defendant Newton:—

"Rat Portage, Ont., May 15th,

"Chas. H. Newton, Esq.,

"Winnipeg.

"Dear Sir: Re Queen's Hotel Site. Solicitor for the purchaser of above refuses to pass title owing to a Mrs. [redacted] wife of a former owner, not having barred her dower. Master of Titles in Toronto, to whom the question was referred, seems to have a doubt about it, and will not, at present, allow the property to be registered under the Titles Act. The solicitor here who was acting for Mrs. [redacted] in the matter, knowing that she had no moral right to her claim, that her legal claim might be overthrown, tried to bluff her for \$500 to-day, but at last agreed to write and advise her to accept \$100 for a quit claim deed. He agreed to send her a quit claim deed for \$1 away to-night to Seattle, where she would then advise her that he would endeavour to collect the \$100. I, on my part, said I would advise you to accept this, for the reason that, even if you go ahead with your proceedings in time made title, your law costs between Ferguson and the solicitor here, and at Toronto, will probably cost more than \$100, and should you succeed in wiping out her claim

sign it away for less than her then estate. Kindly advise me by return above. Truly yours, S. S. Cummins."

that this letter was to be sent to the purpose of obtaining his authority, if it could be made with Mrs. release of her claim, and thereby knew that her claim was the obstacle defendant agreeing to sell to him. Cummins not to enter into an agreement while. He told the plaintiff he could not in the option owing to the difficulty. And it was then agreed that the "to do so" should be added in order not in case the proposed arrangement went out. And upon that understanding of the words, he signed the option.

that the defendant Newton would fore, and that it was not certain that the \$100 as recommended by Cum-

that it was an excess of Cummins's assume to sign an unconditional option. He knew whether the defendant Newton Mrs. Gore ready to receive the \$100

at to accept the document with the or to secure the purchase in the event turning out satisfactorily. On 17th Newton wrote agreeing to pay \$100 on claim deed from Mrs. Gore. But the not that sum, and continued to claim

state of the case the judgment should plaintiff entitled, without any qualification performed in case a good title consequent directions. There is about the title, except the claim made claim is good, it is an objection to the of being removed by the payment of Mrs. Gore will release for the sum of

\$500, but, even if she demands more, the Master must find that a good title can be made upon payment of the sum demanded. And such a finding will entitle the plaintiff to demand that the defendants pay that sum or that there be a deduction from the purchase money to that extent. See *Norman v. Beaupré*, 5 Gr. 599.

Such a result would, as it appears to me, be quite contrary to the intention and true agreement of the parties, and would inflict a hardship upon the defendants.

As the formal judgment is now framed, there is doubt that, viewed in the light of the remarks of the learned Chancellor in giving judgment, it may be so interpreted as to impose that burden upon the defendants.

In my opinion, the agreement ought not to be enforced against the defendants, unless it appears on the reference as to title that the defendants can make a good title without the concurrence of Mrs. Gore, or that they can procure the concurrence for an amount not exceeding \$100, or that the plaintiff is willing to accept the land subject to her claim with a deduction of \$100 from the purchase price.

The judgment should be varied as indicated in the accompanying memorandum. The minutes may be spoken of in Chambers, in case of any difficulty.

JUDGMENT.

2. This Court doth declare that except as hereinbefore declared, ordered, or directed, the plaintiff is entitled to the agreement in the statement of claim mentioned specially performed by the defendants, in case a good title can be made, and doth order and adjudge the same accordingly.

3. And this Court doth further declare that, if it appears that the defendants cannot make a good title without the concurrence of one Mrs. Gore in respect of her claim as mentioned in the evidence herein, they are not required to perform the said agreement unless such concurrence can be procured on payment of a sum not exceeding \$100, or unless the plaintiff is willing to accept the land subject to her claim with a reduction of \$100 from the purchase price of the lands in the pleadings mentioned, and doth order and adjudge the same accordingly.

rt doth order and adjudge that it be
er of this Court at Kenora to inquire
e defendants can make a good title to
adings mentioned without the concur-
s. Gore, and in case he shall find that
ake a good title as aforesaid to the said
an account of what is due to the de-
f them, in respect of the purchase
nds under the said agreement for prin-
d to tax to the plaintiff his costs of this
ppeal to the Divisional Court and the
o and inclusive of this judgment, which
rom what shall be found due in respect
money, and the costs of the said refer-
e discretion of the said Master, and in
defendants entitled to any costs there-
be added to what shall be found due to
n case he shall find the plaintiff entitled
the same are to be also deducted from
hall be found due to the defendants in
urchase money, and the said Master is
d place for the payment of the balance
due on the footing of such account one
ing of his report.

yment by the plaintiff of the balance
nd due to the defendants, or either of
nd place as the said Master shall appoint,
er and adjudge that the defendants do
cient deed convey and assure the said
to the plaintiff, or to whom he may ap-
on oath to the plaintiff, or to whom he
eds and documents relating thereto in
their possession, power, or control, and
o be settled by the said Master in case
out the same.

e said Master shall find that a good title
the said lands without the concurrence
e, and the defendants are unable to pro-
ce on payment of a sum not exceeding
d title can be made in other respects, but
willing to accept the title subject to the
ion of \$100 from the purchase price, it

is ordered that the action be dismissed and that the plaintiff do pay to the defendants their costs of the action and of appeals to the Divisional Court and the Court of Appeal.

7. But if the said Master shall find that the defendant has procured or can procure the concurrence of the said Gore as aforesaid, or that the plaintiff is willing to accept the title subject to her claim with a deduction of \$1000 as aforesaid, or if he shall find that a good title cannot be obtained in other respects, it is ordered that further directions as to costs be reserved until after the Master shall have made his report.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

OSLER, GARROW, and MACLAREN, J.J.A., concurred.

THE
WEEKLY REPORTER

ONTARIO, AUGUST 1, 1907.

No. 10

MAY 7TH, 1907.

TRIAL.

v. CITY OF HAMILTON.

*r—Injury to Pedestrian by Fall on Side-
s Condition by Reason of Snow and Ice
o Period of Condition—Rapid Climatic
ity of Municipal Corporations—Gross*

or Lynn to recover \$1,000 damages for
ained by her on 24th December, 1906,
walk on a street in the city of Hamilton,
was out of repair and unsafe, owing to
efendants in not removing or causing
from large quantities of ice which had

denied negligence and set up that notice
lleged accident and the cause thereof
them within 7 days after the accident,
Municipal Act, 1903, sec. 606, sub-sec. 3.

Hamilton, for plaintiff.

Hamilton, for defendants.

not think there can be a recovery in
t from the question of notice. I think
safe, having regard to the terms of the
ligence"—to hold the city corporation
is sort, where the evidence is of so con-

I think plaintiff's witnesses have ex-
a of the snow, and some of the others

have exaggerated the condition of affairs, and the d must be looked at in this case. The city corporation charge of a large area of streets, and it is an imposs under the climatic conditions which obtain in our v here, to keep ail places perfectly safe. Accidents ar tinuallly occurring; persons slip, getting legs broken and broken. Perhaps I do not speak from judicial exper but it is common knowledge, it almost may be said these cement pavements are the most dangerous thing sible in particular kinds of weather. It is one of the alties we have to pay for our modern civilization. practically impossible to get wood. I suppose we ha adopt them; wood is too expensive; some substitute be obtained, and this appears to be the most availabl permanent, but it has its drawbacks in certain kin weather; with a little water or a little ice on, it is a troublesome matter. And, although there may have some small lumps on this sidewalk, yet I cannot, upo evidence, say they were of such a nature or of such a ance as to fix the city with liability for gross negli That is what we have to get at.

Now, according to the evidence, the fall of snow probably made this condition, was on the Thursday. witnesses do not put the snow back more than 2 or 3 Well, I suppose you may take that as 2 days. Even take it as 3, it would bring the lumpy condition— lumps—to Saturday. Then there was Sunday interv and this accident took place on Monday. Now, it is a s proposition of law to say that this was a state of fa which the city corporation were guilty of gross negli The sidewalk appears to have been cleared on each more than at this particular place, but, according evidence of two of the witnesses, their attention w called to this; it was not observed by the autho although other witnesses passing by observed the same they did not notice anything out of the ordinary; an just one of those cases where, on inspection by a interested or hurt, the place may appear to be dang and its appearance may be taken as some evidence o lessness; and yet I cannot say that it is of such gross acter that defendants should be penalized.

I do not deal with the question of notice; the notio have been in time; but on the facts I think the action to be dismissed. No costs.

JULY 2ND, 1907.

TRIAL.

MMINGS v. DOEL.

*—Contract for Sale of Land—Comple-
Vendor—Purchaser to have Right on
to Complete and Deduct Price from
Money—Payment of Balance of Cash
chaser to Deliver Mortgage for Part of
g Incomplete—Action for Declaration
tory Order for Delivery of Mortgage—*

defendant to deliver to plaintiff a
r \$1,400 upon property purchased by
tiff. The instrument had been ex-
ut not delivered.

for plaintiff.

C., for defendant.

ntiff sold to defendant parts of lots
t side of Indian road, in Toronto Junc-
there were 2 houses erected by plain-
originally was a verbal one. The price,
d all had been satisfactorily agreed
cies prior to 30th October, 1906, and
money had been paid over. On that
writing was made. . . . By this
as "to complete the erection of the
ood, efficient, and workmanlike man-
ertain specific things, including the
te hot water heating system in each
icient for the purpose of heating said
0 radiators in each house." All was
before 15th November, 1906, and in
to have the right to do the work and
the balance of purchase money due
greement was made there was a bal-
ey not paid over to plaintiff, \$1,900,
o be secured by mortgage, and \$1,500,
ced by the adjustment of taxes and
n cash.

The conveyance was executed, so was the mortgage latter bearing date 1st November, 1906. Plaintiff completed, as she says, what she was to do under the agreement. Defendant contends otherwise. Plaintiff required to pay off liens, and defendant, on an adjustment of and insurance, paid to his solicitor . . . \$1,472 full of the \$1,500 mentioned.

It was, in my opinion, in the contemplation of the parties that in case defendant did any of the work mentioned in the agreement, it was to be done immediately after the fault by plaintiff, and the cost of such work was to be deducted from the . . . \$1,500; but that sum, as I have said, was paid over, and the transaction was treated as complete subject only to the mortgage liability on the part of defendant and the liability of plaintiff under the agreement of 30th October. Defendant obtained her conveyance and had it duly registered, but refused to allow the mortgage to be handed over. Neither party asked me upon the trial to determine any question as to the completion of the mortgage according to the agreement, except so far as it was deemed necessary for the purpose of determining the question of plaintiff's right to get the mortgage.

It is in the interest of the parties and of justice that the matters between them in regard to the houses in question shall, as far as possible, be determined in this action.

I find that the delivery of the conveyance to defendant was not authorized except upon the contemporaneous delivery of the mortgage to plaintiff. It was one transaction, and was to be completed as to title and conveyance before the performance by plaintiff of the agreement of 30th October. It was to be completed by giving neither party any advantage over the other—and defendant now has, as against plaintiff, a registered conveyance, while defendant withholds the mortgage. Plaintiff is entitled to have as a security to her for the advance of \$1,400. The mortgage has been executed, and defendant apparently made the necessary declaration of value, but the commissioner omitted to sign that declaration. The solicitor, who is a subscribing witness to the execution of the mortgage, has not made the usual affidavit for the purpose of having the mortgage registered. Plaintiff is entitled to have this mortgage, in a condition complete and ready for registration, duly delivered by defendant to her.

I find that there is no liability on the part of plaintiff to defendant in respect of the completion of said house.

alks, connecting pipes with sewers, or
liability except as to the sufficiency
water heating system, and as to that I do
way. Plaintiff contended that the hot
m was sufficient to satisfy said agree-
ntended that it was not. Under the
ber of radiators is to be not less than
these is for plaintiff, except so far as
may be necessary for sufficient heat-
f the sufficiency of a complete hot water
ny opinion, could well be dealt with by
vestigation, so I was disposed to refer
cial referee, under sec. 29 of the Arbi-
h that in view, the counsel in this case,
before me, but they did not agree upon
were not prepared to make any sugges-
whom I could call to assist me. The
eir strict legal rights. Defendant con-
agreement her remedy is, in the event
of the heating, to do the work and de-
he balance of the purchase money, and
o be left to recover what an expert or
pecially as the work as necessary and
defendant has already been done by her
and is to be done in the other. Under
will not, against the will of the parties,
them, much as I think this would be
ch with a view to saving further litiga-

for a declaration: (1) that plaintiff is
age as asked, completed and ready for
as to matters in agreement . . . de-
a against plaintiff in respect of fences,
down pipes with sewers, or the gables;
ent is to be without prejudice to any
r make against plaintiff for breach of
putting in a complete hot water heat-
said houses, sufficient for the purpose
es, not less than 10 radiators in each
event of the liability under said agree-
ed, and the amount ascertained, defen-
duct the amount so found against plain-
n the amount of said mortgage.

Plaintiff is entitled to a mandatory order for the defence by defendant of the mortgage in question.

Defendant must pay costs, but, as I think some difficulty between the parties has arisen by reason of solicitor acting to some extent for both parties, and all the circumstances, . . . I fix the costs down to and . . . \$100. The subsequent costs of entering judgment, etc., if that be necessary, will be paid by defendant to plaintiff.

BRITTON, J.

JULY 2ND,

TRIAL.

LOGAN v. DREW.

Trusts and Trustees—Assignment of Mortgages by Father and Daughters—Alleged Trust in Favour of Assignor and His Children—Action by Assignee of Father for Declaration of Trust—Parties—Addition of Assignor—Failure of Evidence to Establish Trust—Absence of Fraud—Champerly.

Action by William J. Logan, as assignee of the claim of his father, John Logan, for a declaration that certain assignments of mortgages made by John Logan to two of his daughters, the defendants, were made to them as trustees for him (John Logan) or for the plaintiff and the children of John Logan.

T. G. Meredith, K. C., for plaintiff.

A. Weir, Sarnia, for defendants.

BRITTON, J.:—John Logan, a man of about 75 years of age, with his faculties about him, is the father of the plaintiff and one other son, and of the defendants and four daughters. He was the owner of the mortgages set out in the statement of claim and of a house and lot in the city of Sarnia. He was twice married. His first wife died in June, 1900, or 1901, and he married his second wife in June, 1905, and there promptly followed separation. Her alimony action was begun on 12th September, 1905, and is in evidence, in a general way, that there were unhappy

, and that her alimony action was in 1905. On that day John Logan came solicitor, Mr. John R. Logan, a gentlemanly party, and made an assignment of the three mortgages mentioned. made by James Logan, Spetz, and all to about \$5,400.

plaintiff . . . that these assignments in form, were in fact made to de-

assignment dated 27th August, 1906. That the father, John Logan, was law with his daughters. It is not too litigation, whether for weal or woe, is had obtained the house and lot in ought it, and probably he did, for he proceeds he settled the alimony action the father got some money from the On 8th June, 1906, before settlement before the assignment from his father, sister, Mrs. Drew, a threatening letter of his share of the mortgages, before month. The threat was of a criminal thing which plaintiff says defendant

ons was issued in this case on 31st day plaintiff wrote again to his sister al prosecution, stating that every- unless settled, prosecution would go not at all anxious for disturbance, and would suit me better, and if this is from to-day, I will start at the foot ose and prosecute all that is in my w, and some of the rest of the family eal."

that plaintiff is not the person on t needs to be astute to find improper intent on the part of those whom in this action. If plaintiff, by writ- letters to his sister, one of the de- ct of obtaining a settlement by means prosecution, has not brought himself de, he has come very close to it.

The statement of claim alleges that the mortgages mentioned were transferred to defendants as trustees for Logan, and that they should be re-assigned to him whenever he required that to be done, or, in the alternative, the mortgages were assigned in trust to divide the money when realized, among the lawful children of John Logan as he might direct.

There is no question in this case of fraud or undue influence or want of capacity on the part of John Logan, or want of legal advice. John Logan is exceptionally intelligent and bright and active for a man of his years. He was his own solicitor, of his own mere motion, and gave instructions for the transfers as they were afterwards drawn and executed.

The evidence put forward as evidencing a trust is that of the solicitor John R. Logan. He said that when the assignments were drawn both mortgages and assignments were to be left in his possession, and that John Logan (he would not say that Mrs. Drew so said), "make it so that both are to be present when mortgages taken are assigned." The solicitor says Mrs. Drew said, "You know, father, I am not asking for this for myself—it is in the interest of the family." The solicitor thinks Mrs. Drew said she wanted the proceeds as her father might direct. The solicitor advised some writing, but the parties did not assent to that, and it does not in any way appear that if John Logan wanted any writing, or any understanding in regard to the mortgages, there was anything to prevent his getting it.

The evidence of John Logan was that he should get the mortgages back when he wanted them. No question of division, but he says, "They did say they would divide the money in case of my death." He also stated that if he had not brought suit, he would have let matters stand as they were.

In the absence of fraud or undue influence or want of mind or want of professional advice, it is an unfortunate condition to set aside a transfer of property at the instance of a mere assignee for the purpose of litigation, where the assignor would have allowed the matter to rest. That the case down to the trial, it does not add to the strength of plaintiff's case merely to add John Logan as a plaintiff.

As against plaintiff's case is the evidence of the defendants. Then the affidavit of John Logan, made in t

January, 1906, in which he states that his sons and daughters for support, the 2 1-2 acres in the township of property of any nature or description. time after the assignment to defend order to Mrs. Drew to get these mortgaged. Such an order was not produced. Solicitor remembers it, and refused to

later, speaks of an occasion before the when plaintiff asked their father to get the girls out of the money or mortgages. No, it is the girls', and I will not do examination she said her father's exact gave them to the girls, and I have nothing from them."

practically the same evidence. Neither plaintiff contradicted this evidence, and important as against the trusts alleged. of this transaction seems to be the had in his daughters—not that they to administer any trust declared or they would support him, if necessary, liberally with the rest of the family. have been most liberal to every member Plaintiff is the only one who, so far hostile. Even if for the family, the , other than the plaintiff, are satisfied. fails.

led, John Logan may be added as a ling the usual consent, and the action Logan is added . . . or not.

settlement, I think none was actually ere negotiations certainly, and appar- anding was arrived at as to an amount a complete understanding as to how e applied. When reduced to writing, tiff refused to allow it to be delivered e had the right to do this, so no settle- ide. This, in the view I take of the d.

planation given by both defendants as of money was most inexact and in

some respects unsatisfactory, their evidence was entitled to credit. There was an absence of anything to indicate fraud on their part.

The assignment to plaintiff was not champertous as alleged, the mortgages were impressed in defendant's hands with a trust in favour of the children of John L. then plaintiff would be entitled, and an assignment to him to sue for what he was interested in would be perfectly legal.

Action dismissed with costs.

RIDDELL, J.

JULY 3RD,

CHAMBERS.

REX v. ROBINSON.

Criminal Law — Habeas Corpus — Issue of Second Writ — Change of Circumstances — Right of Appeal — Term of Imprisonment — Commencement from Day of Sentence — Magistrate Allowing Prisoner to go Free—Escape—Expiry of Term of Imprisonment — Discharge of Prisoner—Appeal against Magistrate.

Motion by William Robinson, the defendant, upon return to a writ of habeas corpus, for an order for his discharge from custody.

J. B. Mackenzie, for defendant.

J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J.:—On 17th January, 1907, the applicant was convicted by and before Peter Ellis, police magistrate for a second offence against the Liquor License Act and sentenced to be imprisoned for the space of 4 months instead of at once having him conveyed to the common jail. The magistrate allowed him to go free, taking his recognizance to appear when called upon. Some time in March

e to him, a warrant was issued by the
his arrest, and he was arrested and
common gaol at Toronto. A writ of
been granted, a motion was made
arge on 26th April, 1907. The papers
regular, I refused his discharge, reserv-
a new writ upon the expiry of the 4
of sentence. Upon application made,
5th June, and upon the return a mo-
ne discharge of the prisoner on 27th

at the second writ was irregular and
granted, and *Taylor v. Scott*, 30 O. R.
ort of that proposition. I do not agree.
f *Taylor v. Scott* is that by R. S. O.
n appeal lies to the Court of Appeal
Judge before whom a person deprived
a brought by habeas corpus remanding
therefore, in case such person does not
res adjudicata. Whether the case of
well decided, under the facts and cir-
e, is not for me to inquire—of course
e it in point. And whether R. S. O.
evails over sec. 121 of R. S. O. 1897
mprisoned or the applicant here would
t to appeal to the Court of Appeal, or
ct that an appeal is given only if “the
Ontario certifies that he is of opinion
fficient importance to justify the case
s the case out of the rule in *Taylor v.*
consider. That case dealt with a find-
ould be appealed; and it was held that
one to pursue, if dissatisfied with a
n, is to appeal to the Court of Appeal,
ther Judge, according to the practice
nd that if he fails to take the appeal
te of 29 & 30 Vict. ch. 45, he must be
nt *res adjudicata*. Here, however, the
nted before the expiration of the 4
ent inflicted—the present writ after.
nge of circumstances, the former pro-
e, and there is no adjudication upon
e the Court. The case is nearly like

the civil action of *Barber v. McCuaig* (No. 2), 31 O. R. 126. In that case an action had been brought which failed in the Supreme Court, 29 S. C. R. 126, because the plaintiff had not exhausted her remedies against the mortgaged property and certain persons named. Afterwards, having exhausted her remedies as aforesaid, she brought a new action, alleging the same facts as in the former action, and that she had exhausted the said remedies. Upon defence of *res judicata* being set up, Meredith, C.J., in a carefully considered judgment, held that there could be no such plea successfully pleaded, where the former action failed by reason of the fact that it was prematurely brought. I think the same principle applies here, and that I had the right to grant the new writ upon the alteration of circumstances—but I think that a writ should not be granted upon any ground which has already been taken upon the former application.

I consider, therefore, the one objection only, namely, that the term of imprisonment has expired.

The term of imprisonment begins on and from the date of passing sentence (see R. S. C. 1906 ch. 148, sec. 3), and consequently the full term here has long since expired. It is contended that the facts of this case constitute an escape, and, therefore, the applicant here must serve the full term equivalent to the whole amount of the imprisonment imposed. See R. S. C. 1906 ch. 146, sec. 196.

An escape is defined by R. S. C. ch. 146, sec. 185, as follows: "Every one is guilty of an indictable offence and liable to two years' imprisonment, who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada, without some lawful cause being shown in proof whereof shall be upon him." Here the applicant was at large before the expiration of the sentence, and the whole question is whether he has shewn "lawful cause" for being so at large. The taking of bail was admitted to be beyond the powers of the magistrate, and perhaps the magistrate would be liable for a voluntary escape or a neglect to escape at common law—and it may be that the provisions of the Criminal Code, ch. 146, are wide enough to cover this case. And if the present applicant had, by force or arms, or by craft or guile, brought about his release, he would undoubtedly have been guilty of an escape both at the com-

Code, sec. 185. Much learning upon this is found in Russell on Crimes, vol. I., bk. II., pp. 567 et seq. of the 5th ed., and in Archbold on Crimes and Evidence, 22nd ed., pp. 978 et seq. If, indeed, the applicant had never been released, e.g., by requesting or urging release, he might well be considered as here shew quite a different state of facts. Hence, he was allowed to go away, and when he was brought back by a peace officer to the station he was told that he must enter into a recognizance, so he was sent away. Giving all this into consideration, that every man must be held to know the law, that Robinson, doing as he was directed, could be said to be "at large . . . in a lawful cause;" that is, a cause lawful quoad the law. (This latter is for the Attorney-General.) All the cases of escape reported are cases where the prisoner knew, or ought to have known the law, that he had no right to his liberty—here the prisoner had no reason to suppose that he was not being done regularly, and no mens

should be resolved in favorem libertatis, and the court should do so since the Attorney-General, if he thinks the point of sufficient im-

should be released, and he should have his costs. The magistrate not being a party to the order, I order him to pay these costs. But upon appeal, that no action is to be brought against the magistrate for imprisonment, I order that this protection be given to the magistrate only upon his paying the costs of these proceedings, which I fix

RIDDELL, J.

JULY 3RD,

CHAMBERS.

RE COULTER, COULTER v. COULTER.

*Improvements—Mistake in Title—Administration Proceed-
—Life Tenant—Belief in Ownership in Fee Simple—
port—Reference Back—Inquiry as to Improvements—
dence—Costs.*

Motion by William John Coulter for payment out of Court to him of \$1,598, in the circumstances mentioned in the judgment.

John King, K.C., for the applicant.

F. W. Harcourt, for the infants .

RIDDELL, J.:—The late John Coulter by his last will and testament devised lot 14 in concession A. of the township of Etobicoke to his son William John Coulter, upon the words which have been interpreted to mean that the son took for life. An order was made by Falconbridge, C., for the administration of the estate of John Coulter on 15 March, 1907, and in the course of the administration the land in question was sold—why it does not appear. It is alleged that William John Coulter was advised that he was under the will the owner in fee, at least after he had received from his brothers and sisters a deed which is not produced; and that under such mistake he “expended the sum of \$1,598 for permanent improvements” upon the said land. The Master reports thus: “15. It has been made to appear before me that the said William John Coulter has expended the sum of \$1,598 for permanent improvements which he claims to have made in mistake of title upon the said estate . . .” and I report this specially to the Court at the request of all parties.

A motion was made before me, upon consent of all parties interested, that the sum aforesaid be paid out to William John Coulter. Were all parties sui juris, I should have upon consent made the order. But infants are interested, and it is, therefore, necessary to examine into the legal position.

at bases his claim upon R. S. O. 1897 ch. . . .
 apparent that he is met with a two-fold
 Master has not found as a fact that the
 made under the belief that the land was
 if such a finding had been made, it is not
 the expenditure to which he is entitled, but
 which the value of the land is enhanced by
 s."

partition action, perhaps the first difficulty
 —it is fairly clear that in partition it is
 the amount by which the property has
 by the improvements and repairs made
 interested: Leigh v. Dickson, 15 Q. B. D.
 v. Sanderson, 33 Beav. 534; In re Jones,
 1. But whether, outside of the statute,
 to be allowed for in an action like the
 not decide without argument, if it be neces-
 question at all.

even in a partition, the amount allowed is
 of the expenditure, but the amount by
 of the property is increased—"the increase
 Justice Cotton puts it in Leigh v. Dickson
 which "the present value of the property
 d by the expenditure," as North, J., has it
 ited, but in no case exceeding the amount
 e In re Jones, [1893] 2 Ch. at p. 479.

will be refused, with costs payable to the
 and the matter referred back to the
 pecially: (1) whether the applicant . . .
 rovements on the land in question under
 he said land was his own; (2) if so, the
 of the expenditure in such lasting improve-
 mount by which the value of the land was
 improvements.

d has been sold, the last-named amount
 used value at the sale, and for the purpose
 William John Coulter is said to have bought
 dence as to increased value will be scru-
 more particularly as, though, no doubt, he
 advantages from the improvements, he

can, being himself the life tenant, be charged an occupancy rent. Costs of proceedings in the reference back will be served.

I cannot help suggesting that officers of the Court should endeavour to use the language of the statute, and not employ terminology which may seem to them to be equivocal.

THE O WEEKLY REPORTER

TORONTO, AUGUST 8, 1907.

No. 11

JULY 2ND, 1907.

DIVISIONAL COURT.

MUNCAN AND TOWN OF MIDLAND.

Corporations—Local Option By-law—Order Quashed—Third Reading and Final Passing Premature—Waiver by Council Purporting to Read Third Time after Notice of Appeal—Time for Passing By-law—Necessity for Expiry of Two Months Declaration of Result of Vote—No Necessity for Declaration—Municipal Act—Liquor License Act—Local Option By-law—Irregularities in Voting—Voters Deprived of Ballots in a Box — Publication of Notice — Constitution of Council—Knowledge of Council—Approval of Voters — Voters' Lists — Names of Deputy Returning Officers — Appointment of — Illiterate Voters—Marking of Ballots—Irregularity—Effect on Result—Curative Provision of Statute—Oath for Voters—By-law not Prohibiting Liquor in Places of Public Entertainment—Imposition of Omission.

by the corporation from order of MULOCK, C.J., 1906, quashing a local option by-law passed by the

was heard by FALCONBRIDGE, C.J., BRITTON, J.

Edgins, K.C., for township corporation.

Kenzie, for the applicant.

RIDDELL, J.:—An objection was taken at the of the argument that the town corporation had no right of appeal. It appears that the judgment from having been given 25th April, 1907, the council April, as it is said in deference to the opinion of the Chief Justice, passed a resolution that the by-law should be read the third time, and thereupon purported to pass the by-law the third time and pass it. The by-law was before the council, the original being in Toronto, and a copy was made but the bare form of affecting to read it was done but the bare form of affecting to read it was then declaring it passed. No by-law was signed or passed upon that day or thereafter.

I do not think this is a waiver of the appeal, which had been theretofore given, even if the council had the power to waive a right of this character. The grounds to waive are collected in *Holmsted and Langton*, and I think that the act done here, not being done in action and not such as to signify conclusive acceptance of the judgment appealed from, does not destroy the right of appeal: *Phillips v. City of Belleville*, 10 O. L. R. 1, 1 W. R. 129. Cases such as *International Wrecking Co. v. Lobb*, 12 P. R. 207, in which the appellant has acted in judgment in such a way as to derive some benefit from the judgment, have no application. As at present advised, I think the council would have been wise had they passed the by-law with all formality *ex abundanti cautela*; but that we cannot now decide, as the matter has not come before us for

Upon the merits, I am unable to agree with the Chief Justice. It must, I think, not be lost sight of that the voters of each municipality are vested with the right of self-government to a very large extent, and that their wishes should be given full effect to if at all possible. They should strive to do this; and not be astute to find fault for interfering with the result which should follow from free voting.

The Act 6 Edw. VII. ch. 47, sec. 24, amending the Liquor License Act, R. S. O. 1897 ch. 245, sec. 142, 4, provides that "in case three-fifths of the electors of a municipality upon a local option by-law approve of the same, the council shall, within 6 weeks thereafter, finally pass the by-law, and this section shall be construed as confirming the duty so imposed upon the council may be enforced at the instance of any municipal electors by mandamus."

of the council then is purely ministerial if the electors voting approve; and the power of passing the by-law would, in itself, be of little consequence. The provision, sec. 141 (1), is: "Provided that the passing thereof, has been duly approved of the municipality in the manner prescribed in that behalf of the Municipal Act, approved of by the electors in the manner prescribed by sec. 338 et seq. of the Municipal Act, and such advertisement and other proceedings as may be required; let three-fifths of the electors, in the manner prescribed by the by-law; and the duty of the council is to pass the by-law. I do not think that any proceedings are necessary, such as a summing up, or a declaration of the fact, as provided by sec. 364 or otherwise, has resulted in the statutory duty of the council is clear. Any proceedings may be of assistance to the council in the state of the poll; but I think that the council may do for themselves of this by any other means. The duty of the council of the final passing of the by-law is to ascertain the result of the voting, and to ascertain such fact. There may be an application of secs. 367-374 to a declaration of the council. I think there need be no declaration of the council as to the result of the voting; but the elector who might desire a scrutiny under sec. 369. But if these sections accept the judgment of the learned judge that for 2 weeks after such a declaration the council cannot pass the by-law, the council is in a position in terms, and I do not think the council can be applied. The whole purpose of a declaration is to shew that the necessary three-fifths of the electors have approved the by-law; that being shewn at any time, the by-law rests fails, the necessity of the council is to be wanting (6 Edw. VII. ch. 12). If the council are proved not to have had the necessary majority they have purported to pass. The duty of the council follows in any other case of a by-law; any action or proceeding under the by-law might be quashed by the Court. There is no power of any repeal; that, it is argued, is for-

bidden by sub-sec. 6. As at present advised, however, I do not think that sub-sec. 6 applies to any by-law which in fact received the majority contemplated by the statute, and I think that there would be nothing to prevent the passing of a by-law which had not received the proper majority, unless as that repeal would seem to be.

Even if the council are forbidden to repeal a by-law passed without jurisdiction, I cannot see that the repeal could therefore be considered of any avail.

An objection was also taken that a number of voters instead of handing their ballots to the deputy returning officer for him to put them in the ballot box, themselves put them in the ballot box, and sec. 170 is appealed to which provides that "no person who has received a ballot paper from the deputy returning officer shall take the seat of the polling place; and any person having so received a ballot paper, who leaves the polling place without handing the same to the deputy returning officer in the manner prescribed, shall thereby forfeit his right to vote." The deputy returning officer shall make an entry in the book in the column 'Remarks' to the effect that "such person received a ballot paper, but took the same out of the polling place or returned the same declining to vote, the case may be." Had the section stopped with "forfeit his right to vote," the argument would have had some weight; but the remainder of the section shows that what was being provided against was the voter going without voting, or declining to vote. It never could have been intended that a voter who, upon the direction of the deputy returning officer, himself placed the ballot in the box, instead of handing it to the deputy returning officer, thereby should disqualify himself. Section 204 covers this defect.

Taking now the other objections in the order of notice of motion.

Objection 2. The statute, sec. 338 (2), provides for publishing notice of the by-law for 3 successive weeks, and (1) that the day "fixed for taking the votes shall not be less than 3 . . . weeks after the first publication of the by-law proposed by-law." The first publication was 12th January, 1906, and the day of polling 7th January, 1907. It is seen that 3 weeks elapsed from the first publication to the day of polling, if the word "week" be used in its

ction and overruled it in *Re Armour*, 9 O. W. R. 833. Having read the cases cited by counsel for the reason for changing my view there expressed are as follows, under the Tem-
t 28 Vict. ch. 18: *Coe v. Pickering*,
Richmond, 28 U. C. R. 333; *Brophy*
70; *Mace v. Frontenac*, 42 U. C. R.

sec. 5, that "the clerk . . . shall . . . be published for 4 consecutive days by posting up copies of the same . . . with a notice, signed on some day within the week next to the hour of 10 o'clock in the forenoon, to the municipal electors . . . will be held . . ."

The dates were, first publication 12th
th February. Held, time too short,
ended 8th February.

nd, first publication 2nd October,
ber. Held, that the first publication
d the hour of polling as 10 p.m. in-
rther said that the first publication,
been made 9th October, the fourth
er.

noque, first publication 6th March, and April. Held, that this was not 4

naac, first publication 9th October, ber. Held, that for those townships cation was on 9th October, the time ere, as in Loughborough, the first oter, or, as in Oso, the 12th or 13th oo short; and the by-law was accord-

of a by-law for a loan, Re Armstrong
to, 17 O. R. 766. First publication
olling 7th January, 1889. Held, that
ne expiry of the 5 weeks mentioned

in the statute. *Ostrom v. Sydney*, 15 O. R. 43, and *v. Gladstone*, 15 Man. L. R. 328, are not in point. *Rickey and Township of Marlborough*, 9 O. W. R. 100, does not assist upon this question in any way favourable to an attack upon the by-law. It seems to have been held that a first publication on the 14th December, followed by a second on the polling day 7th January, would answer if the publication in other respects were regular. I adhere to the opinion in the *Armour* case.

Objection 3, that the council were not a lawful constituted body when finally passing the by-law is fully answered in the case *Re Vandyke and Village of Grimsby*, 12 O. W. R. 211, 7 O. W. R. 739, 8 O. W. R. 81. See *Re Armstrong and Township of Onondaga*, 9 O. W. R. at p. 838.

Objection 4, that the council had no knowledge of the by-law having been carried by a majority of voters, assuming to finally pass it, is answered in the earlier case, the judgment, where it is considered that the validity of the otherwise of the final passing by the council depends upon the fact of the vote having been cast—even though the fact be as stated in the objection, which cannot be shown to be proved in view of the affidavit of the clerk.

Objection 5. The same ballot boxes, poll books, voters' lists were made use of on the concurrent vote for water and light commissioners and public school trustees, and said by-law. The statute does not forbid this; and I find that it is contra-indicated; and the case above mentioned indicates that the practice is unexceptionable.

Objection 6. No voters' lists, as required by the statute, were prepared or supplied to the deputy returning officer. This is met by *Re Sinclair and Town of Owen Sound*, 10 O. L. R. 488, 8 O. W. R. 239, 298, 460, 974, which is a very wide application of sec. 204—even if there were any defect, which I am far from asserting.

Objection 7. The voters' list for polling subdivision 3 contained more than the lawful number of names.

The voters' list for this subdivision contains more than 300, but not more than 400, names of voters, and it is held that 3 Edw. VII. ch. 19, secs. 535, 536, apply, so as to make this a fatal error. I do not think so. Sub-section 536 gets over the difficulty; and, at the worst, the provision is applicable: *Re Sinclair and Town of Owen Sound*.

Objection 8. That no deputy returning officer was authorized to conduct the polling.

viding for submission to the votes of
7th November, 1906, appointed the
r, William Clegg as deputy returning
d, James Baker as deputy returning
and Alfred Courtemanche, as deputy
the south ward.

ertised, provided that William Clegg
ing officer for the west ward or polling
es Baker for the east ward or polling
Alfred Courtemanche for the south
sion No. 3. Clegg acted as deputy re-
g subdivision No. 1, and no objection
Baker was apparently unable, at all
, and the clerk of the town, after con-
or, appointed William Gerow to act
lleged to have been done under sec.
g before the time arrived for attend-
Consequently, the provisions of this
literally complied with; but this was
. It was known that Baker would
rning officer, and, instead of going
of notifying him to attend for in-
g for his non-attendance, and then
, the clerk acted at once upon the
ularity is healed by sec. 204.

vision No. 3, by-law No. 632 had ap-
rtemanche deputy returning officer
ion for the municipal elections. This
ere mistake for Alfred Courtemanche
r submitting this by-law to the elec-
name is printed "Alfred Courte-
w as published, and Alfred Courte-
ty returning officer. I see nothing

Cartee and Township of Mulmur, 32
st these two deputy returning officers.
e statute of 4 Edw. VII. ch. 22, sec.
t the provisions of this statute have
h. Supposing the McCartee case to
, I still think that the naming of the
er is sufficient.

poll clerks officiating at polling sub-
were not authorized to do so. By-
18th December, appointed for the
l clerks George Gregory for polling

subdivision No. 1, and William Gerow junior for subdivision No. 2. Gerow refused to act, and was appointed deputy returning officer in the place of James Baker, already been said. George Gregory was appointed in his place by the town clerk after consultation with the council, Gregory thus becoming unable to act as poll clerk in his place. C. H. McMahon was appointed in his place in the same manner. The Consolidated Municipal Act, 1903, sec. 106, as amended by 5 Edw.VII. ch. 22, sec. 3, and 6 Edw.VII. ch. 22, sec. 5, makes it the duty of the council of every local municipality in which an election for members of such council is to be held, by by-law to appoint the poll clerks who are to act as such at the respective polling places. The duties of the poll clerk are not defined; sec. 165 (2) provides that the deputy returning officer may cause him to record the names, etc., of persons claiming to vote; sec. 174 (6), that the poll clerk (if any) shall sign the statement at the close of the poll; sec. 177 (2), that the deputy returning officer may require his declaration before the poll clerk or the clerk of the municipality, or a justice of the peace; sec. 108 (3) provides that if in case of illness, etc., the returning officer or deputy returning officer becomes unable to perform his duties, the poll clerk shall act. It would seem of small importance that poll clerks should not be appointed at all in an ordinary case, and, in my view, even if poll clerks have been appointed, sec. 351, directing such proceedings to be a vote of this character, the facts that none was so appointed for this particular by-law, and that a change was made afterwards in those appointed for the municipality, do not vitiate the election proper, form such an irregularity as is cured by s. 351.

Objection 10, that no copies or lawful copies of the by-law were posted, etc., was before the Chief Justice and was insisted upon, except to contend that they should have been put up outside. There is no substance in this objection, and the extended objection will be considered with objection 11.

Objection 11 is abandoned; as is objection 12. The first part of objection 13 is substantially the matter so considered in this judgment, i.e., as to the effect of s. 108 (3) and need not be further considered.

Then it is said that in polling subdivision No. 1, about half a dozen voters gave open votes; and in no case was there a declaration of inability to read, or physical incapacity for the marking of the ballot, made by the voter: see J. F. Berry, paragraph 18. This is explained by the

having been done by consent of scruti-
nist the by-law, and what happened was
who were unable to read had their bal-
m behind the screen in the presence of
this was wrong: it is only those who make
they are unable to read, who are entitled
cast in the manner mentioned: sec. 171.
re said to have voted in the same way in

f persons thus voting had been large, it
to consider how far this defect was
but not more than about a dozen are
ted in this way. The vote was in all
477, against 234. To destroy the statu-
votes must be struck out, thus: for the
out 126: 351. Against 234; total value
hs of 585, 351.

and Township of Onondaga as to the
culcating the effect of striking off votes.
unnecessary to consider the effect of sec.

w is said to have been brought into the
table for the purpose of receiving a bal-
said to be supporters of the by-law. He
voted, but I find a name William Shaw
No. 3, which I shall assume shews that
se persons acted as they are said to have
; but the matter is a trifling one. Wil-
was helped into the room by two persons,
t that was because he had met with a
l lost one leg, and the assistance was
further sworn that he went alone behind
it.

and his mother are said to have gone
together, the son having received both
is modified by the affidavit of the deputy
ho says that each received a ballot sep-
behind the screen separately, although
the same time. This irregularity is a

were sworn and voted; I cannot under-
ection now taken to these votes can be
e objection 17 below.

William Clegg, deputy returning officer of No. 1, recd a certificate from the clerk of the town that he was entitled to vote, and voted accordingly. I held in *Re Armour Township of Onondaga* that a deputy returning officer has no right to vote upon such a by-law, and I adhere to that opinion. But this does not affect the result of the vote.

Objection 14 is not pressed.

Objection 15, a second ballot illegally used to compel voting—not now urged.

Objection 16, no declarations of secrecy. This is said to be unfounded unless it be considered that there must be a separate voting, etc., for the by-law, and this has already been dealt with.

Objection 17, a worthless form of oath furnished to the deputy returning officer; but this was the statutory oath before 5 Edw. VII. ch. 34, sec. 11; and no one can be deprived of his vote because the proper oath has not been administered to him. It might be different if it were shown that the voters were citizens or subjects of a foreign power.

Passing over objection 18 for the moment, objection 19, the Court below was not asked to deal with, it having been introduced that the applicant might, if so advised, waive the advantage of it upon appeal. The only matter now urged is that the by-law wrongly embraces the public harbour, and the relative authority over which pertains to the federal Parliament.

A somewhat similar objection was raised in the *Onondaga* case and overruled—I still think rightly. The objection fails, even if, as I am far from asserting, the town is not empowered to pass a by-law binding upon a public harbour.

Objection 18 reads: "That the by-law is bad on its face for not prohibiting the sale of liquor in places of public entertainment." In the written argument before Mulock, J., counsel says: "Objection 18 was shewn on the argument to have been raised under a misapprehension." This arose in the following manner. The applicant, Duncan, a dealer in spirits, two years before he applied for a certified copy of the by-law, said to have been informed by the son of the town clerk that a few of the sheets of the "*Midland Argus*," in which the by-law had been published, were left over, and that he would receive a certified copy which he would receive from the town clerk.

from one of these copies—and, upon application, he received from the clerk one of them upon the faith of the copy so furnished. The motion was launched. The copy

by retail of spirituous, fermented, or other liquors, is or shall be prohibited in every house of public entertainment, in the sale thereof, except by wholesale, is prohibited in every shop or place other than a house of public entertainment in the said municipality.” When produced upon the argument before the court, the judge read, “in every tavern, inn, or other place of public entertainment,” and the punctuation was changed to “sale thereof, except by wholesale, is prohibited.” The original by-law being read by the counsel for the applicant seems to have been copied, as published in the “Argus,” and the original in the municipality, were the same as the original. The judge, therefore, thought no objection could lie to the by-law. Upon discovering his error, he asks that the objection be now to the objection that the by-law was not read or posted at all, as an exact copy

is not to allow a mere inadvertence or mistake to deprive the applicant of any rights he is entitled to.

O. 1897 ch. 254, sec. 141 (1), provides: “In any township, city, town, and incorporated village, the laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors, in any house or place of public entertainment, prohibiting the sale thereof, except by wholesale, in places other than houses of entertainment, the legislature has used the double form “prohibiting the sale . . . in any tavern, inn, or other place of public entertainment,” and “prohibiting the sale of spirituous, fermented, or other manufactured liquors, by retail, in shops, and places other than houses of public entertainment.” These are not the same. The former being aimed at the prohibition of public entertainment; and the latter at the prohibition of sale by retail everywhere, except in a

"house of public entertainment." It is plain, I think, that the phrases "tavern, inn, or other house or place of entertainment," and "houses of public entertainment" are used as equivalent, and, therefore, the omission is immaterial. If "place of public entertainment" be included, the expression "house of public entertainment" (as I think) the words "or place" may be omitted without harm; and the latter part of the by-law, which prohibits the sale, by wholesale, in every place other than a house of public entertainment, prohibits the sale by retail in such a place of public entertainment." After the passing of the law, any one who kept a "place of public entertainment" and who sold liquor by retail, would be placed in the dilemma—either this place is a "house of public entertainment," or it is not—if it is, the sale is forbidden by the former part of the by-law—if not, the sale is forbidden by the latter. The omission is trivial and should not affect the validity of the by-law.

Before us was raised the objection that there were independent subject matters voted upon at the same time as indicated above. But that is for the legislature; see the above quoted, appears to permit this, and I can find nothing to indicate that the whole subject matter of that sale may not be incorporated in one by-law, and be passed at the same time by the voters.

On all grounds taken, I am of opinion that the appeal upon the by-law fails, and that the appeal should be allowed with costs in this Court and in the Court below. As at the hearing, quashing the proceedings of 29th April, the costs of that order will be set off against the costs awarded under this order.

I have not thought it necessary to refer to more than a few of the numerous cases cited by counsel. I have read them all, however, and a few others—only a few, there were very few left.

FALCONBRIDGE, C.J., agreed with the opinion of the majority.
DELL J.

BRITTON, J., agreed in the result, for reasons stated in his writing.

JULY 3RD, 1907.

WEEKLY COURT.

AND UNITED TOWNSHIPS OF
SHERWOOD, JONES, RICHARDS,
AND BURNS.

*Quash By-law of Township Corporation
—Necessity for Confirmation by County
Council—Appeal to County Council—Exhaustive
Remedies before Moving to Quash.*

applicant upon an application to quash a
for the costs of the application.

the applicant.

n, for the municipality.

By-law No. 188 was passed 15th Decem-
municipality of Hagarty, Sherwood, &c.,
a road allowance. The particular facts
passing of this by-law are not material, as
1907, this by-law was repealed. In the
r, an application had been made to quash,
reduces to a question of costs—no unim-

saying of the late Mr. Jacob, that the im-
ons was in this ratio: first, costs; second,
rd—very far behind—the merits of the
L.J., at pp. 344, 345, of *Hall v. Eve*, 4
I cannot continue with the Lord Justice
e employed in the argument of the present
olly disproportionate to its importance,”
upon my intimating an opinion that the
have stood an attack, contented himself
the application was premature, as the by-
confirmed by a by-law of the county coun-
(2) of the Consolidated Municipal Act,
Moss argued *ab inconvenienti* and upon
ing v. Cardiff, 2 O. R. 329. This case
e case of a by-law opening a street upon
the application to quash must be made
om the actual passing by the council, and

it is not sufficient that the motion be made within one from the registration, even though the statute then in R. S. O. 1877 ch. 174, sec. 507, provides that, before by-law "becomes effectual," it shall be registered in registry office. This legislation has been continued through 46 Vict. ch. 18, sec. 547; R. S. O. 1887 ch. 184, sec. 55 Vict. ch. 42, sec. 547; R. S. O. 1897 ch. 223, sec. 55 and is now 3 Edw. VII. ch. 19, sec. 633. The provisions will be found practically identical through this whole period.

The Court in the *Harding* case seem to have considered that an application to quash might be made before the registration—and were the present case governed by the legislation, I should follow the *Harding* case without other remarks.

But the legislation governing such cases as the present is different. This is found in 3 Edw. VII. ch. 19, sec. 633 (2), which comes from R. S. O. 1897 ch. 223, sec. 660 and further back 55 Vict. ch. 42, sec. 567 (2); R. S. O. ch. 184, sec. 567 (2); 48 Vict. ch. 18, sec. 566 (2); R. S. O. 1877 ch. 174, sec. 525 (2)—and it provides that "no by-law shall have any force, unless confirmed by a resolution of the council of the county in which the township is situated, at an ordinary session of the county council, held sooner than three months nor later than one year next to the passing thereof."

However it may be in the case of a by-law which has full validity, needs only the act of registration—such act may be performed at any time—I cannot think that the Court should interfere so long as there is an appeal tribunal to whom appeal may be made. It is apparent to me, that the intention of the legislature is that a session of the legislative body shall pass upon the propriety of such a by-law as this before it becomes law—and that body is expected to act in the public interest. I do not intend to decide in the case would be if there were delay in presenting the matter to the county council, or anything in the nature of fraud or collusion preventing an honest consideration of the by-law on its merits. I hope the arm of the Court will be found sufficiently long to reach any case of that kind. In the ordinary case, however, I think that before approaching the Court and asking the Court to exercise its discretion to quash a by-law, all the other remedies should be exhausted.

not unlike the case of members of benevo-
position when asking the Court to inter-
Zilliax v. Independent Order of Forest-
, 13 O. L. R. 155, and Re Errington v.
W. R. 675.

ould have no costs of the motion, but,
should not have passed the by-law in
costs against him.

ng been repealed, there will be no order

JULY 3RD, 1907.

TRIAL.

TOWN OF BROCKVILLE.

*al Appliances—Injury to Person Using
municipal Corporation Operating Electric
der Statutory Authority—Spike on Post
Electricity—Failure of Person Injured to
ce.*

er damages for a shock and severe burns
ff by accidentally touching an iron spike
tric light pole belonging to defendants,
the ground, which spike was used to
owering and raising a lamp.

ckville, for plaintiff.

a, K. C., for defendants.

At the close of the trial I expressed the
not, upon the evidence, find defendants
igence, and after further consideration
am unable to change my opinion. It is
s no satisfactory evidence to account for
electric current down the pole and into
unable to find that there was any defect
r other apparatus, or that the plant and
t of the most modern and approved type.

Defendants constructed and are operating the municipal lighting system under authority of legislative enactments, and, in the absence of negligence, are not insurers against accidents. . . .

[Reference to *Roy v. Canadian Pacific R. W. Co.*, [1900] A. C. 220; *National Telephone Co. v. Baker*, [1893] 2 O. R. 186.]

It is equally well settled by many authorities that persons who operate or deal in dangerous material are obliged to take the utmost care to prevent injuries to the public as well as to their employees, by adopting all known devices to that end. But in this case not only did plaintiff fail to prove default, but I think the evidence offered by defendants shewed that they complied with the law.

Plaintiff sought to bring the case within the decision in *Gloster v. Toronto Electric Light Co.*, 38 S. C. R. 27, but the judgment in that case turned upon the finding that the wires in the condition in which they were at the time and place where the boy was injured constituted a danger to those using the highway, and were, in fact, a nuisance, in that the wires had become worn and defective and had ceased to be insulated. In other words, the defendants were, in that case, found guilty of negligence.

The action must be dismissed with costs, if costs are insisted upon by defendants.

THE
D WEEKLY REPORTER

TORONTO, AUGUST 15, 1907.

No. 12

JULY 3RD, 1907.

WEEKLY COURT.

DAVIES v. FOX.

Don—Bequest of Shares in Company—Distinction—Shares Held in Different Rights — Codicil — Legatee may Purchase Shares at Par.

Plaintiff for judgment on the pleadings in an action on the will of Emma Davies, deceased.

For plaintiff and defendant Robert H. Davies.

For defendants Fox.

Court, for infant defendants and defendant

—James Davies died in 1892, leaving an estate produced amongst other amounts for his expenditure of shares in an incorporated company. By his will he bequeathed to his executors (one of whom was Emma Davies) all his estate upon trust to sell the same into money and to stand possessed of the proceeds in trust (after certain legacies) to pay the income to Emma Davies for life, and then to divide the whole among the father, brother, and sisters of the testator and share alike. Ellen Davies, a sister of the testator, at the death of the testator, had a vested interest in the fund, though she could not take any interest in the fund till the death of Emma Davies. The fund was not owned by James Davies, but, as Emma Davies had an interest in a certain business, when James Davies died, it turned into a joint stock company.

company, his executors received the stock as representing James Davies's share in the business. This never turned into money.

Ellen Davies died in July, 1905, having bequeathed her property to Emma Davies.

Emma Davies died in May, 1906, having made a will and codicil thereto, upon the construction of which was asked to pass.

In the view I take of the case, I do not think that I can enter upon the consideration of the learning as to conversion and re-conversion. I think the will and codicil are plain and their effect is plain. Emma Davies admitted that the other shares in the company in her own name, and the shares in all.

The will provides as follows:—

"12. I hereby give . . . unto my son Robert H. Davies all stock, provided the same does not exceed 10 shares, belonging to me or forming part of my estate in the William Davies Company Limited . . . other than those shares in the said . . . company . . . which will fall into my estate as heir and devisee of my daughter the late Ellen Davies.

"13. All the rest and residue of my estate . . . including the share of my daughter Ellen in the estate of James Davies, I give . . . as follows: one-third to my son Robert H. Davies, the income of one-third to my daughter Emma Fox, the corpus to be divided equally among her children as hereinafter provided, and one-third thereof to the children of my deceased daughter Ann Davies to be equally divided among them. Should my son Robert H. Davies die in my lifetime, his share of the residue of my estate shall be paid to his executors to form part of my estate. Should my daughter Emma Fox die in my lifetime, her issue shall take between them the share which my daughter Emma Fox would have taken if she had survived me."

From this it is plain that Emma Davies distinguished between the shares she had in her own name and the shares which she would become entitled as heir and devisee of Ellen Davies; and that she considered all to be part of her estate. Distinguishing as she did, she intended that my son Robert should have the former up to 10 shares, the rest, if she should have any more at the time of her death, and also all "which will fall into my estate as heir and devisee of my daughter, the late Ellen Davies, to become part of the residue.

at the shares appreciated in value.
provides:—

that all stock in the William Davies
may at the time of my death form
st offered by my executors to my son
a price of \$100 per share par value.”
the testatrix, having already shewn
nsidered the shares coming to her as
Ellen Davies as part of her estate,
d of Robert receiving shares in her
to be allowed to buy all at par, and
es are in the hands of the executors
has, I think, supplied in the will a
may deduce the meaning she attaches
at may . . . form part of my
ould, of course, be given to the de-
when these can fairly be determined
ament, and that, I think, can be done

aration that Robert H. Davies is en-
ly the shares standing in the name
also the proportionate part of the
name of the executors of James
entitled.

event—the costs of the official guar-

JULY 3RD, 1907.

TRIAL.

AND BUTTER CO. LIMITED v.
BANK OF CANADA.

*Warehouse Receipts — Assignment to
Note—“Negotiation”—Bank Act, secs.
—Formation of Joint Stock Company
Business of Unincorporated Company
e — Title to Goods Warehoused —
—Parties—Company in Liquidation—*

r in name of company in liquidation,
December, 1905, under the Dominion

Winding-up Act, to recover the proceeds of 500 butter sold by defendants.

I. F. Hellmuth, K. C., and J. R. Meredith, for p
F. Arnoldi, K. C., for defendants.

TEETZEL, J.:—Defendants claim 401 cases under house receipts dated respectively 21st and 26th September, 1905, and 4th, 19th, and 20th October, 1905, issued by the McLean Produce Company Limited, warehouse-keeper of the Toronto Cream and Butter Company, and indorsed by defendants in the name of that company by W. A. Clark, manager, on 23rd October, 1905.

On 20th October, 1905, Clark warehoused with the McLean Company 45 cases, and on 21st October, 1905, which comprise the other 99 cases in question, but no house receipt was ever issued for them.

The Toronto Cream and Butter Company, which hereafter refer to as the unlimited company, was a name used by Mrs. Annie E. Clark, and the business managed by her husband, W. A. Clark, under the name of attorney.

By Ontario letters patent dated 5th April, 1905, the plaintiff company were incorporated, one of the objects being "to acquire and assume and continue as a going concern the business hitherto carried on under the firm name of the Toronto Cream and Butter Company." The stock was fixed at \$60,000, \$20,000 of which was to be 10 cent. preference shares.

By agreement dated 1st June, 1905, between Mr. Clark, carrying on business under the said trading name of the first part, and the plaintiff company, of the second part, the former agreed to sell and the latter agreed to purchase all the property, assets, rights, credits, and interests of the first part, including all plant, machinery, contracts, etc., together with "the goodwill of the business, with the exclusive right to use the name 'Toronto Cream and Butter Company' as part of the name of the company, and to represent the company as carrying on such business in continuation of the business of the firm and in succession thereto, and the right to use the words to indicate that the business was carried on in continuation of or in succession to the said firm," etc.

until the liquidation order, the business name of the unlimited company, in-
ing business, and it was not until some
house receipts in question had been
endants knew that a limited company
d I am not able to find that at any
on defendants or their manager knew
s asserted to be that of the limited

noted that at a meeting of the pro-
the plaintiff company, on 25th July,
usual officers were elected, a resolution
s fully paid up shares of the common
company be allotted to Mrs. W. A.
ht, title, and interest in the Toronto
company, and that the said Toronto
company Limited take over, as a going
assets, contracts, real estate, and
interests of the Toronto Cream
ny, and assume responsibility for
d as of 1st June. At the same meet-
n was passed that the property occu-
Cream and Butter Company Limited
r. Harry Webb for \$7,000, to be paid
f 60 shares of preferred and 10 shares
plaintiff company, to be delivered to
on of all papers necessary to a clear
ng also the Crown Bank was selected
bank through which all the business
d be transacted; and the seal was pro-

erty was executed by Mr. Webb, dated
either the stock allotted to him nor that
r formally issued.

the shareholders of the plaintiff com-
a October, 1905, when a resolution was
d confirming the purchase of the busi-
Toronto Cream and Butter Company,
posed agreement then read, and fur-
tion of the agreement by the Toronto
company, Mrs. Clark directed and auth-
to be executed by the company under
d authorized the directors to allot to

Mrs. Clark, or her nominee, \$27,500 par value of common stock and to do everything necessary to complete and carry out the transfer according to the agreement. She was to take over and assume the business and assets and liabilities of the company in session under said agreement.

At the meeting of 25th July W. A. Clark was appointed general manager.

The company never appear to have passed any amendments to its by-laws.

The agreement with Mrs. Clark bears the signatures of the plaintiff company and the signatures of the president and secretary. I presume it was executed after the shareholders' meeting on 20th October, pursuant to the resolution.

There is no record of any meeting either of the directors or shareholders subsequent to 20th October, and there is no record of any other business of any kind having been done in the corporate name, but everything was carried on in the name of the unlimited company, as before.

The unlimited company had opened an account with the bank, defendants in November, 1904, following upon a letter written by the company to the defendants' manager. In November, the material parts of which are: "Dear Sir: Our Mr. Clark called upon you some time ago in connection with opening an account in your bank. We would like to open a line of from \$10,000 to \$12,000, secured by warehouse receipts upon creamery butter, to be stored with the Cold Storage Company, or Canada Cold Storage Company, Montreal. Also a line of one or two thousand upon promissory note, secured by our general account assets as shown in our statement. I may say that the latter amount would only be required for a short time during the winter season, when our business is principally local."

From the opening of the account until 23rd October, 1905, the bank had not received any warehouse receipts. On that date the bank account was overdrawn by \$1,000 and there was under discount an unsecured note for \$6,000 due November, 1905.

When the 5 warehouse receipts were indorsed to the bank, on 23rd October, 1905, Clark, in the name of the unlimited company, and as manager, signed a promissory note for \$6,000 at three months, "with interest until paid," which was discounted, and the full \$6,000 placed to the credit of the company.

same time Clark, in the name of the
signed a hypothecation of the ware-
ssed to be in consideration of the bank
e note of \$6,000 and as security for its
dants' manager, Mr. Young, says that
greed that he would bring in further
ufficient to cover the debt; also, that
ave been made if security had not been
out there is no evidence that the 99
warehoused on 20th and 21st October
rds specifically referred to by Clark.

\$6,000 to the credit of the account,
it balance of \$4,258.01, in addition to
ote. This balance was thereafter grad-
the time of the liquidation there was
\$6,000 note, a \$2,000 note discounted
and an open debit balance of less than

s made to draw out the \$6,000,
ves it uncertain whether the company
wed to do so. The most I can say is
press prohibition against doing so, nor
e to do so.

on the defendant realized on the whole
given an indemnity to the warehouse
o the 99 cases.

eneral questions arise for determina-

tiff company any title to the 500 cases
If the answer to this is no, of course

they were the property of the plain-
entitled to the proceeds of the 401
warehouse receipts?

d to the proceeds of the 99 cases?

estion, I think the effect of the agree-
Clark and the plaintiff company was,
it was adopted by the shareholders on
in the company all her business, assets,
nue the business in her trade name.

l adopted of continuing all the busi-
the old company for the benefit of the

new was objectionable in many respects, and gives to the argument that there never was, in fact, any of ownership or control, I think Mrs. Clark would topped from claiming any interest in the property subsequently acquired by the company, except in her capacity as stockholder, and that, therefore, the butter transaction was the property of the plaintiffs when it was housed.

As to the 401 cases, I think defendants are entitled to hold the proceeds thereof by virtue of sec. 73 of the Act, now sec. 86, R. S. O. 1906 ch. 29.

Counsel for plaintiffs submitted that the case brought the transaction within the prohibitive provisions of sec. 75 of the Bank Act, now sec. 90, R. S. C. 1906 which provides that "the bank shall not acquire or hold warehouse receipts or bill of lading or any such document as aforesaid to secure the payment of any bill, note or liability, unless such bill, note, debt, or liability was created or contracted, (a) at the time of the acquisition thereof by the bank, or (b) upon the written promise or agreement that such warehouse receipt or bill of lading security would be given to the bank."

And it was argued that the case was governed by *Bank of Hamilton v. Bank of Montreal*, 27 O. R. 435, 24 A. R. S. C. R. 235, which decided that a bill or note taken by a banker is not "negotiated" within the meaning of the Act at the time of the acquisition of the security by the person giving the security, and to whose account the proceeds of the bill or note are credited, is not at liberty to draw against them except on fulfilling certain other conditions.

I am unable to find in this case that the transaction of discounting the \$6,000 note and placing the proceeds to the credit of the overdrawn account was a mere fiction intended only to reduce the overdraft, or that there was any restriction against the customer drawing the same in the ordinary course of business, and, therefore, *Bank of Hamilton* would not apply.

This case is more like *Ontario Bank v. O'Reilly*, L. R. 420, 8 O. W. R. 187. In that case there was no creation of a note and an actual advance at the time of the creation of each warehouse receipt; although on most occasions when the discount was effected the account was overdrawn that was in the ordinary course of dealing, and the

prive the transaction of its character of the note, for the proceeds were placed at the disposal of the customers, and the drawings continued as before, and it was held, *disapproved v. Bank of Hamilton*, that the warehouse receipts were valid securities.

It may be the legal effect of the transaction that what was done when the warehouse receipts were issued, in the light of the two cases referred to by the majority of 28th November, 1904, would entitle the bank to the warehouse receipts as security for the overdraft constituted the large overdraft referred to. In my opinion, "a written promise or agreement that warehouse receipts would be given to the bank in satisfaction of the Bank Act, and while the receipts are not identified in it, and a different result would be reached, I think when the customer assigned the warehouse receipts it was the intention of both parties that the receipts should be taken in satisfaction of the "written promise" made when the overdraft was advanced. While the promise may not have been fulfilled, it entitles the bank to an equitable claim in respect of its specific performance or otherwise, upon the same basis as with the McLean Company, the plaintiffs' execution of the transaction, be permitted.

In these cases, I am of the opinion that no warehouse receipts having been given or assigned in respect of the overdraft, the bank is not entitled to hold the proceeds. There was no written promise or agreement to furnish any warehouse receipt, no agreement to warehouse goods for the bank, and no executed appropriation of the warehouse receipts to a written promise. At most there was a promise to issue receipts for the 401 cases were advanced in reference to further warehouse receipts, the overdraft being unexecuted and in violation of the Bank Act and being beyond the power of the bank to issue receipts to the bank in reference to the cases. See *Bank of Toronto v. Perkins*, 8 S. C. R. 201, and *Performance*, 4th ed., p. 217, and cases.

The learned counsel objected that the liquidator and not the bank should be plaintiff, and cited *Kent v. Comptroller of Charity of Providence*, [1903] A. C. 413.

This being an action to recover the company's property it seems to me it is properly constituted within the jurisdiction of that case. Upon the objection being raised, the costs were applied for leave to add or substitute the liquidator as plaintiff, but it does not seem to me that any amendment is necessary.

The judgment should, therefore, be in favour of the plaintiffs for the net proceeds of the 90 cases received by the defendants, amounting to \$1,198.89, with interest at 5 per cent. from 27th January, 1906.

As plaintiffs have failed in the more substantial part of their claim, the judgment will be without costs. The defendants have also failed in a material part of their claim, and should not be allowed costs. See *Suter v. Merchants' Bank*, 24 Gr. 365, where, under similar circumstances, the same result was disposed of in this way.

MACMAHON, J.

JULY 3RD

TRIAL.

McGUIRE v. GRAHAM.

Vendor and Purchaser—Contract for Sale of Land Made by Clerk of Vendor's Agent—Ignorance of Vendor of Identity of Vendee—Right to Repudiate on Discovering True Identity—Duration of Agency—Termination of Authority—Acting as Representative of Actual Purchaser.

Action by George F. McGuire against Mrs. Graham and one Hill for specific performance of an alleged agreement to sell to plaintiff the house and premises 190 King Street west, in the city of Toronto. The property was owned by defendant Mrs. Graham.

C. Millar, for plaintiff.

G. H. Kilmer, for defendant Graham.

J. A. Rowland, for defendant Hill.

MACMAHON, J.:—I find that the property in question was, a year and a half ago, placed in the hands of G. Strathy to sell, Mrs. Graham, the owner, stating that

was, as I found at the conclusion of the
a desire to carry out the sale, solely for
Graham, his non-disclosure that he was
rendered the sale to him invalid at her
ing that he was simply the clerk or man-
s of her agent, Mr. Strathy. . . .

[Reference to *McPherson v. Watt*, 3 App. Cas. Robertson v. Mollett, L. R. 5 C. P. at p. 655, L. R. 7 802; *Dunn v. English*, L. R. 18 Eq. 524; *Murphy v. C* 2 Jo. & Lat. 422; *Wright on Principal and Agent*, 2 p. 15; *Story on Agency*, 9th ed., sec. 31.]

The argument of counsel for plaintiff was, that, Graham had fixed \$9,000 as the price at which she was to sell the property, the duties of her agent terminated when he obtained a purchaser at such price, (Strathy), through Hill, in obtaining from his principal an agreement to sell at the price named, was merely as a go-between or middleman . . . and, therefore, not violating any duty he owed his principal, the vendor . . .

[Reference to *Short v. Millard*, 68 Ill. 292; *Si Gould*, 7 Lansing (N. Y. Sup. Ct.) 179; *Rupp v. Sa* 16 Gray (Mass.) 398; *Mullin v. Keltzleb*, 7 Bush (Ky. Ranney v. Donovan, 78 Mich. 318—distinguishing cases.]

During the argument I entertained the opinion that Mrs. Graham, the vendor, had advised Strathy that she would accept \$9,000 for the property, Strathy's offer to the defendant Hill might be regarded as merely bringing the vendor and intending purchaser together, and would therefore come within the above cases in the United States Courts, cited by Mr. Millar. But, after considering the cases, I am satisfied that they do not apply to the present case. What was done was not merely bringing the vendor and the intending purchaser together and leaving them to consummate a bargain, but Hill, the manager in Strathy's office, made an offer for the property as the actual intending purchaser, which was accepted by Mrs. Graham in ignorance of his being the representative of Strathy, her agent. If she asked who Hill was, she should have been informed that he was an employee in Strathy's office, and, on being so informed, if she executed the contract, she would have been bound.

Judgment for defendants dismissing the action against defendant Mrs. Graham with costs, and as against defendant Hill without costs.

JULY 4TH, 1907.

CHAMBERS.

RNOLDI v. COCKBURN.

*ment of Claim — Professional Services —
Solicitor—Claim for Lump Sum—Quan-
Defence of Criminal Charge — Other*

tiff from order of Master in Chambers,
particulars of statement of claim.

plaintiff.

K. C., for defendant.

dismissed the appeal with costs.

JULY 4TH, 1907.

WEEKLY COURT.

RE YOUART.

*—Gifts to Religious Bodies—Statutes of
legislation Permitting Societies to Take
ain — Validity of Gifts — Provision for
Right of Legatees to Immediate Payment—
Rule to Charities—Lapsed Gifts—Divi-
testacy.*

onal representatives for an order under
ing certain questions arising under the
senior.

on, for applicants.

for Upper Canada Bible Society.

the Methodist Church.

Guelph, for executors.

John Youart senior died in 1860, leaving
June, 1860, whereby, amongst other
ided as follows:—

pect that, after the death of my beloved
estate shall be sold by my executors by

public auction, for cash or credit as my executors may think fit, and that the price of said estate which is then so taken together with all the other money which may remain from the sales or incomes as afore-directed, shall be put out to interest and given and divided as follows: first, \$100 to be given to the Chapel Fund, and of the remainder one-half to be given to the Bible Society and the other half to be divided equally between the missionary labours of the New Connexion Methodists and the Preaching of the Gospel of the Lord Jesus Christ to the body of Christians among us in this circuit, which moneys are to be paid in the following manner, viz., the whole of the yearly interest and \$50 of the principal to be paid annually to the Bible Society from their half, until the whole of the aforesaid half is exhausted, and the Missionary Society shall have the whole of the yearly interest and \$25 of the principal yearly from their share until it is exhausted. And they that preach the Gospel among us of the aforesaid denomination shall have the whole of the yearly interest and \$25 of the principal yearly, till the whole of the Preaching share is exhausted." (I have corrected the orthography which is in some cases unconventional.)

The widow died 4th May, 1907; the original executors are all dead. A motion is made to the Court: (1) to determine the validity of the gifts aforesaid to (a) the Chapel Fund, (b) the Bible Society, (c) the New Connexion Methodists; (2) to determine whether the moneys should be retained by the personal representatives of the deceased or paid over at once; and (3) to determine whether the proceeds of the real estate or any part thereof are to be distributed as upon an intestacy. It is plain that the statute of 1892, R. S. O. 1897 ch. 112, does not apply, the testator dying before 1892: sec. 2.

The two gifts (a) and (c) may be considered together. The celebrated case of *Doe dem. Anderson v. Todd*, 2 R. 82, is conclusive against the validity of these gifts, there can be set up subsequent legislation authorizing the New Connexion Methodist Church or its Chapel Fund to take in mortmain. No such legislation can be found.

For some reason—perhaps because that religious society was rather a missionary church sustaining very close relations with the parent body in England—they do not seem to have sought such legislation as the sister church, the Wesleyan Methodists, obtained in their Act of 1851, 14 Vict. ch. 142.

then, are void by the statutes of mort-

history of the New Connexion body was
 ing in their contention. In 1874, by 38
 three churches, the Wesleyan Methodist
 the Wesleyan Methodist Church of East
 and the New Connexion, have their real
 ty vested in a new church, which they
 n, called the Methodist Church of Can-
 of that Act the provisions of 14 & 15
 ade to apply to such new church. But
 on that the provisions of 14 & 15 Vict.
 o apply retroactively to either of the two
 with the Wesleyan Methodist Church,
 Act had been originally passed.

church united with three other churches
 dist Church," and by 47 Vict. c. 88, sec.
 us formed was given all the powers, etc.,
 original body for whose benefit the Act
 142 was passed, by that Act. But, as
 retroactive effect given to this section—
 take the matter any further.

ble Society was sufficiently awake to the
 ion to apply for an Act. This is to be
 Vict. ch. 229, and it gives the society the
 nder any legal title whatsoever, and to
 d purposes of the said corporation, with-
 thORIZATION, all property, real and per-
 re and kind soever, which may hereafter
 equeathed, or granted to the said cor-
 The wording is substantially the same as
 Smith v. Methodist Church, 16 O. R. 199,
 entitle the society to receive and hold
 . The Act of 1877, 40 Vict. ch. 62, sec.
 the Bible Society "to take or hold by gift,
 ny land, or tenements, or interests there-
 ise, or bequest be made at least 6 months
 of the person making the same." This
 have been passed *ex abundanti cautela*.
 t quoted stand alone, it would furnish an
 legislature had not intended to give by
 tion, more extensive powers, but sec. 3
 s Act shall not be construed so as in any
 away from, or diminish any of the rights

powers, or privileges granted" by the Act of 18 V. 230. I am of opinion, therefore, that gift (c) is valid.

The second inquiry need give no great trouble. The provisions of the will are, that of the money given to the Bible Society the whole of the interest for the year and, in addition, \$50 of the principal, be paid each year.

The rule which, after having been adumbrated in many cases, as, e.g., by Sir Lancelot Shadwell, V.-C., in *Jones v. Josselyn*, 9 Sim. 63, was laid down clearly by Lord Macnaghten, M.R., in *Saunders v. Vautier*, 14 Beav. 115, is as follows: "Where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to receive a valid discharge." See also *Gosling v. Gosling*, Johns. & Wood, V.-C. (Lord Hatherley).

In the early stages of the much litigated case which went to the House of Lords in 1895, under the name of *Wharton v. Masterman*, Wickens, V.-C., intimated an opinion that this rule does not apply when the legatee is a charity, and upon an application by charities to stop an accumulation directed by the will there in question, declined so to do. In *Harbin v. Masterman*, L. R. 12 Eq. 559. A subsequent application was made by the next of kin, and that came before Mr. Justice Stirling, that learned Judge thought that the Vice-Chancellor had not decided that the rule in *Saunders v. Vautier* had no application to charities, but that he meant to do was to reserve the question for decision in a later period." The learned Judge then considered at length the question of the application of the rule, and came to the conclusion that the rule was applicable to charities: *Wharton v. Masterman*, [1894] 2 Ch. 184, pp. 187-193, inclusive. In that opinion the Court of Appeal and subsequently the House of Lords agreed: *Harbin v. Masterman*, [1894] 12 Ch. 184, pp. 195-200; *Wharton v. Masterman*, [1895] A. C. 413.

The whole of the money to which the Bible Society is entitled may be paid over at once.

The foregoing considerations determine the answer to the third inquiry. First, the \$100 in gift (a) is taken out of the fund, then the half of the remainder is added, and these two amounts are to be divided as on an intestacy.

Costs of all parties are to be paid out of the lapse of the gift, those of the representatives of James Youart senior by the solicitor and client.

THE
WEEKLY REPORTER

WINTO, AUGUST 22, 1907.

No. 13

JULY 5TH, 1907.

CHAMBERS.

DOYD v. SERGEANT.

Jurisdiction — Division Courts Act, sec. 16—Right in Wrong Court as against Garnishee at Trial of Claim against Garnishee to Jurisdiction by Primary Debtor—Common Law Cause of Action of Division Court Judge — Right to

Application for prohibition to the 1st Division Court of Algoma.

J.C., for defendant.

for plaintiff.

The action as originally framed added the Co. as garnishees. Admittedly the action was in the right Court as against the garnishee. The Division Courts Act, R. S. O. 1897, disputing the jurisdiction was filed by the plaintiff but the garnishees filed such a notice. The primary debtor objected to the Court, whereupon plaintiff abandoned all claims against the garnishees. Counsel for the primary debtor contended that the section (190) was not valid and that the Court could not obtain jurisdiction without amendment. He did not, it appears, ask the Court to require the re-service of the summons,

and the case was fought out on the merits. The Judge served his decision, and subsequently gave judgment for the plaintiff. A motion for a new trial was refused. A motion is now made for prohibition.

In addition to the objection already mentioned, it is urged that this is an action under the Saw Logs Drive Act, R. S. O. 1897 ch. 143, and that the jurisdiction of the Court is ousted by sec. 16 of that Act.

The Judge in the Court below, from a consideration of the case, came to the conclusion that an action lay at common law and independent of the statute; and the Court overruled the objection.

In the view I take of the case, I do not think the Court was called upon to examine into the correctness of this decision. The principles upon which a motion of this kind should be disposed of have been very recently considered in *Re Township of Ameliasburg v. Pitcher*, 13 O. L. R. 8, 8 O. W. R. 915, and *Re Errington v. Court Doucette*, 14 O. L. R. 75, 9 O. W. R. 675, and I adhere to all that is said in these cases. In determining whether a certain set of facts gives a cause of action at the common law, the Court below "may . . . mis-decide the law as freely as a Judge as high an immunity from correction, except upon appeal, as any other Judge:" *Re Long Point Co. v. Anderson*, 10 A. R. 401, 408. . . .

I do not suggest that the decision is unsound. Considerable support for it may be found in *Drake v. Sault Ste. Marie Pulp and Paper Co.*, 25 A. R. 251; and I do not think that *Cockburn v. Imperial Lumber Co.*, 26 A. R. 1, 1 C. R. 80, decides anything to the contrary.

As to the other ground, I do not think that sec. 16 of the Division Courts Act prevents the Court from having jurisdiction in acquiring, if the word be preferred, jurisdiction: *Sebert v. Hodgson*, 32 O. R. 157.

The motion fails and will be dismissed with costs.

JULY 5TH, 1907.

CHAMBERS.

RE BARTELS.

*Corpus—Motion for Discharge—Escape
Custody of Sheriff while Motion being
attempt and Crime—Motion Retained
and Proceedings against Prisoner for*

an Bartels senior, upon the return of a
an order for his discharge from custody
his extradition to the State of New
arge of perjury.

C., and N. Sommerville, for Bartels.
elland, for the State of New York.

artels, a very wealthy brewer of the
was, in the Supreme Court at Auburn
, 1905, convicted of an attempt to com-
of a brewery or malt house with intent
rance companies. Sentence being de-
ted to bail in the sum of \$15,000, and
being forfeited and an action brought
and verdict given against the defend-
eir attorney settled the action by pay-
time it was expressly stipulated that
tlement of the bail bond, the Board of
resolved that the criminal proceedings
e interfered with. This was some time
1906. In the meantime, in May, 1906,
een found against Bartels in the same
with perjury, alleged to have been com-
his trial for attempt to commit arson.
he province of Ontario at least part of
1906, a bench warrant was issued by the
said Court for the arrest of Bartels with
him before the Court upon the indict-

on or about 1st May, 1907, at Niagara
e chief of police, and, after proceedings

unnecessary here to consider, the Judge of the Court of Welland, as extradition commissioner, issued his warrant under sec. 18 of the Extradition Act, R. S. C. 1906 for the committal of Bartels to prison for surrender to the United States.

On 27th June I granted a writ of habeas corpus, and stipulating that the production of the prisoner should be waived, and this waiver was expressly agreed to. In July the case was argued before me, and I reserved judgment.

Being informed by an officer of the Court that the prisoner had been in Toronto, and had during the time of the trial escaped from custody, I caused the registrar to inform the sheriff of Welland, in whose custody the prisoner was, to produce the prisoner before me, whereupon the registrar was this morning informed that Bartels at noon yesterday had escaped from the sheriff, and had not yet been arrested. So much is before me officially. In addition I have been informed by an officer of the Court that the sheriff of Welland brought the prisoner to Toronto at his own request, that he brought him into Court at Osgoode Hall; that the prisoner alone in the charge of him, he went to a closet, leaving the prisoner alone in the hall; that upon his emerging he found the prisoner had escaped. Whether these statements are true, I do not know judicially.

By the common law any one who is arrested and who loses his liberty before he is delivered by due course of law is guilty of an escape, and any one who, being in lawful custody, frees himself from it by any artifice and eludes the vigilance of his keeper, is guilty of an offence in the nature of contempt, and punishable by fine and imprisonment: see *Re Watts*, 3 O. L. R. 279, 1 O. W. R. 133. And our Criminal Code, R. S. C. 1906 ch. 146, sec. 190, provides that "every person who, being in lawful custody . . . escapes from such custody."

Bartels has apparently treated with contempt the laws of the country in which he sought an asylum. The Court, without considering the arguments advanced or made, has to deal with the application, I retain the motion and judgment has been proceeded against for his violation of the laws. The leave being reserved to apply to me upon a change of circumstances: see *Re Watts*, 3 O. L. R. 279, 1 O. W. R. 133.

take it for granted that he will be
utmost diligence. The last man in
ollar in the treasury should be at the
authorities in their efforts to re-arrest
laws of two countries. Our national
d name of our province and Dominion
res no great effort of the imagination
indignation with which the people of
imilar occurrence if a convicted crim-
n Canada to the United States and
escape as this convict was here when
upon another charge. If we are to
ther nations, and our own—if we are
with justice of impartial and effective
ce, it is of the last importance that
any there be — who are accessories to
g in his offence against our law, be
with unrelenting rigour.

there can be no question of sympathy
refugee alleged to have been harshly
people; it is here the case of a fugi-
his own land brazenly setting ours at

the interval will be utilized by those
uct of the extradition proceedings in
fects—as to whether the alleged de-
othing at present.

JULY 6TH, 1907.

CHAMBERS.

TRONG v. CRAWFORD.

*m—Motion to Strike out—Irregularity
Convenience — Trial — Relief Asked
gments—Declarations of Ownership—
reements.*

nts Thomas Crawford and S. R. Clarke
in Chambers striking out the counter-

claim of the appellants against defendants Murdoch McLeod, Donald Crawford, and John McMartin.

S. R. Clarke, for appellants.

J. B. Holden, for defendants Murdoch McLeod, Donald Crawford, and John McMartin.

D. Urquhart, for plaintiff.

RIDDELL, J.—Plaintiff brings his action against 6 defendants, Nos. 2, 3, 4, 7, and 8, and the administratrix of 5, as set out hereafter. He alleges that before 29th September, 1904, he (1) and defendant Donald Crawford (2) made a verbal agreement (A) for him to advance Donald Crawford (2) moneys and to have equally with Donald Crawford (2) in mining claims in which the latter might be interested, and that he (1) did advance some money accordingly.

Then it is alleged that defendants Donald Crawford (2), Thomas Crawford (3), and Murdoch McLeod (4), made a verbal agreement (B) whereby they were to have an equal interest in discoveries they made; that Donald Crawford (2) and Murdoch McLeod (4) did prospect and plant a post in the mining location known as the Lawson mine, which I shall call X; that Thomas Crawford (3) got a mining location and subsequently a patent of this X. The statement of claim goes on to allege that Donald Crawford (2) and Murdoch McLeod (4) pretend that they made an agreement (C) with John McLeod (5) that John McLeod (5) was to have an equal share with Donald Crawford (2), Murdoch McLeod (4), and Thomas Crawford (3), in this location X. Then it is said that on 29th September, 1904, Donald Crawford (2), applying for more money to the plaintiff (1), gave a written transfer (D) to plaintiff (1) of a half interest in the shares held by Donald Crawford (2) in 4 mineral claims, amongst them X. At this moment Donald Crawford (2), Thomas Crawford (3), and Murdoch McLeod (4) were entitled to apply for a lease or patent of X. Afterwards Thomas Crawford (3) obtained the lease, and subsequently the patent, but in trust for Donald Crawford (2), Murdoch McLeod (4), and plaintiff (1).

Then Donald Crawford (2) and Murdoch McLeod (4) began an action against Thomas Crawford (3) and one Herbert E. Lawson (6) for a declaration that Thomas Crawford (3) held the lease in trust for Donald Crawford (2) and

Murdoch McLeod (4); and John McLeod (5) and his committee began an action against Thomas Crawford (3) and others to have it declared that John McLeod (5) was entitled to a quarter interest in X. These actions were tried and judgment given declaring that Donald Crawford (2), Murdoch McLeod (4), and John McLeod (5), were each entitled to a quarter interest. Plaintiff (1) was no party to these actions. No conveyance has been made to Donald Crawford (2).

The statement of claim ends by alleging that on 13th July, 1905, Donald Crawford (2), Murdoch McLeod (4), and John McLeod (5), entered into an agreement (E) with John McMartin (7) giving him an option to buy their interest in X, but this was without the knowledge or consent of plaintiff, and that John McMartin (7), before he exercised his option, had full notice and knowledge of plaintiff's claim.

S. R. Clarke (8) is made a defendant in the style of cause, but he seems to have been forgotten; at all events, he is not named or referred to in any way except in the style of cause.

The prayer of the statement of claim is that plaintiff (1) be declared entitled to a one-sixth interest in the location X.; i. e., ignoring the alleged rights of John McLeod (5), plaintiff alleges that Donald Crawford (2), Thomas Crawford (3), and Murdoch McLeod (4), were the owners each of one-third, and he (plaintiff) was entitled to half of that held by Donald Crawford (2). A further prayer is that it may be declared that the agreement (E) is not binding upon plaintiff. An injunction, an account, and general relief, also are claimed. . . .

Then Thomas Crawford (3) and S. R. Clarke (8) file a defence and counterclaim. They admit agreement (B), apparently deny the existence of (C), admit the actions and the result, that plaintiff was not a party and was not bound by these, and also the fact that no conveyance has been made to Donald Crawford (2), and that the agreement (E) had been made. They specifically deny that Thomas Crawford (3) took as trustee for Donald Crawford (2), Murdoch McLeod (4), John McLeod (5), or any of them; say they had no knowledge or notice of agreement (A) or agreement (D), or any advances to Donald Crawford (2), until the

trial of the actions referred to. They say that a lease was entered with Donald Crawford (2) and Murdoch McLeod (4) began prospecting and were joined by John McLeod (5), and a number of discoveries were made. Murdoch McLeod (4) and John McLeod (5) applied for a lease of a discovery immediately south of and adjoining that Thomas Crawford (3) was informed of the discovery of X, but not of that of the other property nor of the application for it; that Donald Crawford (2) and Murdoch McLeod (4) proposed to Thomas Crawford (3) that Murdoch McLeod (5) should be admitted to a quarter share, but he refused, and consequently John McLeod (5) abandoned any interest he might have in X; that agreement terminated on 1st October, 1904, and on 10th October, 1904, Murdoch McLeod (4) abandoned his claim in X, so that thereafter Thomas Crawford (3) applied in his own name for a lease; Murdoch McLeod (4) assisting by executing an affidavit in support as a disinterested person. Murdoch McLeod (4) and John McLeod (5) had abandoned all interest in the discovery X, and that the lease was granted to Thomas Crawford (3) absolutely. Then the plaintiff goes on to say that the sole issue in the actions mentioned was whether Thomas Crawford (3) held an undivided three-fourths in trust for Donald Crawford (2), Murdoch McLeod (4), and John McLeod (5); that prior to bringing the actions Donald Crawford (2), Murdoch McLeod (4), John McLeod (5), and John McMartin (7) had conspired to acquire the three-fourths interest by fraud, on the terms that John McMartin (7) was to finance the action (which was to be brought in the name of John McMartin (7)) and share in the proceeds of the litigation; that Donald Crawford (2) and Murdoch McLeod (4) committed perjury upon the trials; that on 8th June, 1905, Thomas Crawford (3) gave H. E. L. (6) a license to prospect and mine on the discovery X, and afterwards Thomas Crawford (3) agreed with Donald Crawford (2) and Murdoch McLeod (4) to divide equally between them all the profits to arise from this prospecting and mining (F); that this agreement (F) was without consideration and procured by the fraud of Donald Crawford (2) and Murdoch McLeod (4). It is further pleaded that the discovery of X is in fee simple absolute to Thomas Crawford (3), that the Ontario Judicature Act . . . does not apply to mining leases, and no fiat of the Attorney-General has been obtained. The Land Titles Act is pleaded, as also the Statute of Frauds. The prayer is that

be dismissed: a declaration that the validity; that they be set aside for fraud of the Court; that the agreement (F), be set aside; that Donald Crawford (4), the administratrix of John Mc-McMartin (7), be restrained; that Murdoch McLeod (4), and John McMartin, costs, and damages occasioned by the of this action; general relief is also

made before the Master in Chambers by Crawford (2), Murdoch McLeod (4), and for an order setting aside the counter-claims: (a) that it is irregular; (b) that it is not properly tried in a separate action; and costs. The Master set the pleading

that the position of plaintiff is that Donald is entitled to a one-third interest in X, and one-half of that one-third; it is also interest Donald Crawford (2) has in X, half of that interest. Asking a declaration Crawford (3) as to his (plaintiff's) clear that the question must be tried two as to what the actual interest of is. Thomas Crawford (3) alleges that he has no interest because he abandoned right otherwise have had; that must be set aside. That the judgments under which Donald are invalid, having been obtained by fraud, that must be tried. It is true that these judgments are bad so far as they entitle (5) a one-fourth interest, but he does not have advantage he himself (1) may gain by the sale of his trustee (2). Thomas Crawford (3) alleges that the agreement (F) was obtained by Donald Crawford (2) by fraud, and that Donald Crawford (2) has no interest in the land through that agreement. The question must be tried.

Further in a few words, plaintiff (1) claims, in his pleading, a declaration that he is entitled to one-third or of such smaller share of

X as Donald Crawford (2) is entitled to; and that Crawford (2) is entitled to one-third or some smaller share. In that action, the question whether Donald Crawford owns any and if so what share in X must be tried. Thomas Crawford (3) should be allowed to set up in that way every fact which shews that Donald Crawford is not entitled to any share or not to such a large share as may be claimed for him. Certain judgments must be got rid of; an agreement is to be got rid of in order to maintain the claim of plaintiff made through Donald Crawford, and it is right to counterclaim to get rid of these judgments. If a separate action were brought to get rid of these, Donald Crawford (3) would be well advised to make plaintiff a party—otherwise upon succeeding in the action he would be met by a claim such as is made by plaintiff in this action in his attack upon John McLeod (5). Plaintiff may say, "I was not a party to that action, though you have claimed a one-half interest in what Donald Crawford was nominally entitled to."

I think the Master was wrong so far as this ground of attack goes.

Then as the question of convenience, I think it is much more convenient to try out the whole matter of ownership of this location in one action with evidence before the Court, and I think that, were two separate actions brought, I should consolidate them, or at all events order them to be tried together.

The other grounds set up are not based upon facts which can be decided in this summary way. Though the relief sought may not be such as can be readily claimed (as to which I express no opinion), and though it may be inartistically asked, I am clear that the plea of a whole should not have been struck out.

The appeal will be allowed with costs here and there against defendant Thomas Crawford (3) in any event of the

JULY 8TH, 1907.

CHAMBERS.

DERLEITH v. PARSONS.

Copy of Shorthand Evidence Taken in Allowance between Party and Party—Subpoena—Letters, Attendances, and other

off and cross-appeal by defendant from senior taxing officer at Toronto of de- action for redemption.

aintiff.

., for defendant.

This was an action for redemption, re- at for redemption, which involved the ge accounts in the office of the Master erable oral evidence was given, begin- , 1905, continuing 14th November, 8th ary, 1906, 7th February, all before the while the evidence of one witness was 22nd November, 1905, before Mr. Bas- hat purpose by the Master.

was taken down in shorthand, which fills 193 pages of typewriting. I can- ant is responsible for any unnecessary e. At the close of the sitting of 5th , counsel for defendant, said: "Might our that a day be fixed now with refer- en Mr. Bastedo may be able to produce he evidence. I think it is absolutely the importance of some of the points." good—I will adjourn it until this day

raised to this by counsel for plaintiff; ered, and, according to the usual prac- n Ordinary's office, one copy was fur- r and one for the counsel ordering the ents per folio being made to cover both.

Defendant inserted in his bill an item: "Attention pay for notes of evidence, 50 cents, and paid \$29.25." was disallowed by the taxing officer, and defendant a

It was stated before me that the taxing officer refused the item because he considered that . . . *Re Robinson* 16 P. R. 423, prevented him allowing such an item in a case in the Master's office. . . . *Re Robinson* . . . not, I think, decide what has been suggested. . . .

Where the evidence is taken in shorthand, it is possible for any counsel that I know of to take "such notes of the evidence as he may require, as the case proceeds." *ex parte*. And this is a fortiori if the evidence deals with a number of small items, and still more so if the evidence has been taken from time to time over an extended period . . .

No general rule can be deduced from *Re Robinson* at least where the evidence is not taken in longhand.

I have examined the proceedings and availed myself of such information as could be furnished me by the shorthand grapher in the office of the Master. From such information I am of opinion that the evidence was properly ordered, and that the costs thereby incurred "were necessary and proper for the attainment of justice and defending the rights of the" defendant.

I see no good reason why such evidence should be disallowed (under the practice in vogue) in the Master's office—as it may be to counsel under other circumstances. See *Gage v. Canada Publishing Co.*, 19 C. L. J. 175, 3 C. L. J. 267, a judgment of Proudfoot, J., after consultation with Boyd, C.

The price seems to be right.

The appeal of defendant will be allowed with costs, which may, at his option, be added to his claim.

Plaintiff also appeals, his appeal covering some \$300 in all.

1. Attended by plaintiff's solicitor on inspection of our productions . . .

Of this \$2 was allowed. The objection is based on . . . *Brown v. Sewell*, 16 Ch. D. 517. . . . In relation to this decision it is to be observed that there was no item allowing costs for attending on such inspection. See *Wilson's Judicature Act*, 2nd ed. (1878), pp. 459-462.

now: McKenzie's Yearly Practice, 1907, the former tariff there is a fee allowed inspect or produce for inspection documents in any pleading or affidavit pursuant to r. xxxi, r. 14—our Con. Rule 469 (1): Con's Judicature Act, 2nd ed., p. 459; 1907, p. 1077.

an item as our No. 90, which allows costs of documents when produced under order in a case, therefore, does not govern; the fee is reduced to \$2, as it has been by the

discretion, and the discretion rightly made same remark applies to 3.

advising on evidence. It is argued that fees be allowed upon taking accounts in the fees for counsel are allowed for counsel's attendance to the Master (item 155), and I am not sure why, that being so, tariff item 157 justifies the taxing officer to allow a fee for the same. If I am permitted to appeal to my own discretion, I would say that the taking of accounts and scrutiny of evidence and winnowing out of any part of a counsel's practice.

fact decided against the appellant. of discretion.

\$10 for attending on return of motion, taxing officer to \$2, is justified by item 91. Amount to call50c. .02c. that the client would have had to call for that the solicitor should have waited for that I do not think so. Then it is said that the fee included in the instructions given when I think not, and the quotation from p. 118, does not assist.

all day making copies of entries in\$10.00
 getting copy of entries in book in Master's\$10.00
 is cited as against this charge, but I do not see the relevancy of that case here. This was per folio, and is justified by item 57.
 of discretion.

13. It is said that 5 items here are not allowable tariff. I need not refer specially to the tariff item, the objection is baseless.

14. Attended by defendant, going over account charge of plaintiff, considering and advising on (\$5,00, reduced to \$4 by taxing officer, is properly allowed.

15. Feb. 3. Attended by plaintiff's solicitor, going over accounts thoroughly and discussing and making list of items cannot be agreed upon, and arranged that same be put to Master and evidence and agreement confined to

16. Feb. 6. Attended by T. Hislop, going over accounts when he admits certain of accounts and initials

These, allowed by the taxing officer at \$5 in proper charges under item 142.

17. Subpœna. It is argued that once a subpœna has been procured in any action, no second subpœna can be obtained, and Rule 480 is appealed to, to support this contention. Counsel for plaintiff upon the argument that it was his practice, after having used a subpœna one day, to alter it for use in the same action if required to subpœna witnesses for a subsequent occasion, hope that he is singular in that practice. Once a subpœna has been used to bring the witnesses who are required to be sworn at any sittings of the Court, whether at nisi or in the Master's office, it is proper, and I think necessary to procure a new subpœna for the witnesses to be examined upon a subsequent day. I am not now discussing whether it is known in advance and before the first sitting that a certain witness will be required at a particular day—or even at any time in the future. In that case a witness may be subpœnaed before the first sitting, and told that he will be needed upon the day certain, and he will be notified of the day upon which he will be required. I am not deciding that such a subpœna and notice would be effective, but simply that it would not be improper after the first day of the sittings it would be improper to alter the date in the subpœna, and a witness served with a subpœna on its face for a day then past could not be compelled to obey the subpœna.

This objection is overruled.

18. A matter of discretion and fact.

ending at Master's office and arranging
on Friday 23rd inst.\$1.00
ing officer at 50 cents, and not further
rt it to explain the following, which is
axable"—"Attended by client and advis-
.....50c."

06, and in lieu of a letter.

d depending upon facts.

leave authorities with Master50c.

It is argued that this is included in the
ink not. It is not usual for counsel to
e, and the office boy must be made to

er from Mr. Hislop with agreement and
Master, perusing and considering . . \$2.
and properly so by tariff item 89. It
Hislop that it was not much of an affi-
need perusal. I cannot think, however,
ould be justified, upon receiving an affi-
he solicitor on the opposite side, in say-
is another of that man's affidavits; I
to the waste paper basket." It might
at that might be the proper destination
scarcely be considered safe for any solici-
t granted.

Master with objection to reception of evi-
ed by plaintiff . . . \$1.00.

ing officer at 50 cents.

Hislop with copy of letter to Master . . .

ing officer at 50 cents.

ss and unnecessary. I do not so find.

counts, considering and taking instruc-
niary accounts . . . \$5.00.

ing officer at \$2. Covered by item 38.

counts and finally settled and preparing
unt . . . \$5.00.

ing officer at \$1—not too much, I think.

fees, it is argued, should have been al-
e, as it is said no important point or
d. I am unable to agree. I think that

the taxing officer rightly exercised the discretion given by the Rules, and that the provisions of tariff item 156 were rightly applied.

On all the points taken, this appeal fails, and is dismissed with costs; these costs defendant may, if advised, add to the mortgage claim.

I lay down my pen with some regret; it is such as these which relieve the dull monotony of life in days.

Since the above was written, I have had the advantage of a conference with my Lord the only surviving Justice of those who constituted the Court which decided *Re* *son*; and I am by him authorized to say that I have correctly interpreted that case, and that the Court never intended to lay down the rule that copies of depositions taken in the Master's office could in no case be allowed on taxation between party and party or otherwise.

THE
WEEKLY REPORTER

NTO, AUGUST 29, 1907.

No. 14

JULY 8TH, 1907.

CHAMBERS.

CHANAN v. BROWN.

*Prohibition—Division Court—Territorial
Case of Action, where Arising—Action
is Sold—Plaintiff Consenting to Trans-
Motion for Prohibition Launched.*

ant Brown for the costs of a motion
hibition to the 5th Division Court in
l, in the circumstances stated in the

r defendant Brown.

laintiff.

efendant Brown lives in Seaforth, in

Plaintiff resides and carries on busi-
nder a firm name at Ingersoll, in the
On 20th February, 1907, a summons
ance of plaintiff against defendant from
rt in the county of Oxford for \$18.30,
count for goods supplied and interest
was served upon defendant in Seaforth.
te note, disputing not only the claim
tion of the Court. He alleges that a
s firm shortly afterwards saw him in
avouring to arrange a settlement, said
l have to be tried in Seaforth, but that

plaintiff's firm wished to save the necessity of a Seaforth, and so would like to arrange a settlement. Chell Thomas Buchanan makes an affidavit and says "there is no member of plaintiff's firm other than myself, and neither I nor any agent of mine had any authority to do what is stated in said paragraph to have taken the case to decide what Court had jurisdiction to try this case, I confess my inability to understand this.

However that may be, a letter is written to the clerk of the Oxford Court by defendant's solicitor, from which it appears a few days after the alleged interview, in which the clerk states that plaintiff's agent had been in Seaforth during the interview and admitted to defendant that the Oxford Court had no jurisdiction, and that the case must be transferred to Seaforth. He adds: "The defendant resides here, the interview took place here, and under no circumstances could the Oxford Court have jurisdiction. Bring this letter to the clerk of the Judge, and see that the case is transferred to Seaforth. In view of plaintiff's agent's admission, I did not think it necessary to send a witness down to attend Court. I will depend on you to have this attended to."

At the first sitting of the Oxford Court the clerk of the County Court was not present, and the solicitor for the plaintiff was acting Judge, and, as the clerk writes to defendant's solicitor, he "only tried cases he was not interested in himself. I shewed the acting Judge your letter."

At the next sitting of the Oxford Court defendant's solicitor did not attend, but the matter was gone on with in his absence, and judgment given for plaintiff for \$15.70 and \$3.00, although the clerk says, "I shewed your letter to the acting Judge."

Defendant's solicitor, upon being notified by the clerk of what had been done, at once wrote to plaintiff, and in the first letter he had written to the clerk of the County Court, and notifying plaintiff "unless you at once notify me that you are willing to have said judgment vacated and the action properly transferred to the 2nd Division Court of Huron," a motion would be made for prohibition. Upon plaintiff writes "..." and asserts his right to the intention to enforce the judgment. The letter was received on 6th April. On 15th April notice of motion for prohibition was served upon the Judge of the County Court of Oxford, returnable 19th April. On 16th April plaintiff made an affidavit saying that he is informed

nt intends to move for prohibition;
o incur any risk or question of costs,
res that the case should be transferred
Court of the county of Huron, I am
gment entered herein should be set
ade transferring the suit to the 2nd
e county of Huron." An order was
cation of plaintiff, setting aside the
rring accordingly. So much appears
d. . . .

ook place between the solicitors for
costs, and, at the suggestion of plain-
nt's solicitor also wrote plaintiff. This
. . . and so at last a notice of motion
, 1907, that plaintiff should pay the
ngs taken for prohibition. . . .

led to these costs if prohibition would
nd certainly there is nothing in the
act or word—which entitles him to
tion.

dy resides at Seaforth, and he swears
s in question in said action were ar-
wn of Seaforth or by correspondence,
he dealings was I at any time within
aid 5th Division Court of the county

swears: "It is entirely untrue . . .
sactions in question in this suit were
town of Seaforth. The whole of the
. . . were sold to defendant on orders
or at the said town of Ingersoll, where
is, and in no other way; and payments
be made at Ingersoll, where the goods
defendant, and were so made."

was had at the instance of defendant
advised, cross-examine Buchanan upon
not done so. I presume, then, that
nt agree as to the facts, and that de-
swearing to what he considered the
facts. At all events for the purpose
st accept plaintiff's statements. But
f the affidavit which he makes to meet
is taken strictly. . . .

[Reference to *In re Doolittle v. Electrical Manufacturing and Construction Co.*, 3 O. L. R. 460, 1 O. W. R. 2 v. Reid, 8 O. W. R. 623, 763.]

Taking plaintiff's affidavit, he does not pretend the goods became the goods of defendant at Ingersoll; the goods need not be received by defendant before they attach to defendant for the price. Prima facie the goods must be made at the time or before the money the price thereof is payable, and I see no reason to indicate that defendant here could not traverse the delivery to him. Such delivery would, of course, in the absence of some special agreement such as is not shown here, be outside of the jurisdiction of the Oxford County Court.

The case is not like *Re Noble v. Cline*, 18 O. R. 240.

The action should, therefore, not have been brought in that Court, and plaintiff will pay the costs.

JULY 1.

DIVISIONAL COURT.

HOUSE v. BROWN.

Contract—Sale of Goods—Provisions as to Payment—Deferred Payments to be Agreed upon Subsequent to Completion of Contract—Vendor not Entitled to Interest—Purchaser Taking Possession of Goods to Testify to Completion of Contract—Dismissal of Action—Costs.

Appeal by defendant from judgment of MORRIS J. of County Court of York, in favour of plaintiff, for recovery of \$145, the price of a "House cold tin" awarded as damages for breach of contract to purchase the same.

F. M. Field, Cobourg, for defendant.

F. E. Hodgins, K. C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., J., ANGLIN, J.), was delivered by

ANGLIN, J.:—The contract between the parties, dated 7th April, 1906, is in the following terms:

"ORDER.

"(Cobourg, Ont.), April 7th, 1906.

onto, Ont.

urchase from you one No. one House
 please ship to me at Cobourg, county
 ut 190.. for which . . .
 . . . f. o. b. Toronto, Ont., as fol-
 . and I agree to execute notes as

..... due	190..
..... "	190..
..... "	190..
..... "	190..
..... "	190..
..... "	190..
..... "	190..
..... "	190..

to be made as soon as I have had suffi-
 arrival of the machine at destination
 ee that it is in proper working order,
 calls to instruct me how to operate
 e be found to be defective in either
 y you immediately and to take said
 ereafter as it is repaired or replaced

machine to remain in Julius F. House
 paid. Said notes to bear no interest
 ach of said notes shall be a lien upon
 d.

with the understanding that you are
 ne subject to your printed warranty,
 e according to your printed instruc-
 agree to do, and if on receipt of this
 to do the work claimed for it, I will
 ediate apply to you for instructions
 and in the event we cannot agree as
 capable of doing what you claim for
 abide by the decision of disinterested
 the usual way.

dge a copy of this order at this date.

Geo. M. Brown.

subject to the approval of Julius F.

The agent of the vendor communicated to the plaintiff a circular which contained the following clause: "The price of House cold tire setter No. 1 is \$145, c. o. b. cash in Canada; \$40 cash; balance in payments as may be agreed on; and a discount of \$10 will be allowed for full payment within 10 days after receipt of machine."

By the evidence taken at the trial it was shown that the dates of the deferred payments were to be agreed subsequently by the parties, and a letter of 10th April from plaintiff to defendant contained this sentence: "I note that you have left the date of your deferred payments to be decided upon when my agent calls on you." On 8th May a letter of 8th May, 1906, to defendant, plaintiff referred to the fact that "the times and amounts" of the deferred payments are still to be settled.

The machine was shipped to defendant about the middle of April, and was taken by him from the Grand Central station at Cobourg. He tested the machine, and on 10th May decided to return it, writing on that date a letter intended for plaintiff, but which, however, did not reach him until 22nd May. In this he states that he has returned the tire setter back to the vendor, and intends to place a new order, upon the ground that the machine would not do the work required of it. The present action was commenced on 19th July, plaintiff claiming to recover the price of the machine sold to defendant, or, in the alternative, damages for breach of contract to accept and pay for the same.

For the appellant it was urged that the evidence showed a parole collateral agreement that there should be no contract between the parties unless the machine was approved after test by defendant; that the machine delivered was not that which was ordered; and that there was no evidence to warrant a finding that the machine had been accepted by defendant.

We expressed our opinion in the course of the judgment that upon none of these grounds could the appellant succeed. Counsel for the respondent was heard on the question whether, in view of the fact that the deferred payments were to be agreed, of further agreement between the parties, there was a binding contract of sale for breach of which the plaintiff was entitled to damages.

It is well settled law that to render a contract complete there must be a price ascertained or as

as the Court had to deal with contracts
ence, and proceeded upon the rule that
which has passed between the parties must
eration in determining whether or not

there is a completed contract and what the contract was because the consideration of the entire contract made it manifest that, although the price was amounts of the deferred payments and the dates the same should become payable were left to be subsequently agreed upon by the parties, that it was held that in fact, no completed agreement between them.

I can see no distinction in principle between the present and the present, where the memorandum of the contract itself shews upon its face that the amounts and dates of the deferred payments were left to be settled by subsequent negotiations, and the subsequent letters of the plaintiff shew that this was his understanding of the situation.

McGibbon v. Charlton, decided in the Court of Appeal for Ontario on 24th December, 1902, and not reported (1 O. W. R. 828), is a decision to the like effect. In that case the price was ascertained, but the agreement, as far as it related to the time of payment, provided that payment should be made within 90 days of the shipment, or, if the purchasers desired more than 90 days for part, interest was to be paid on such part after 90 days. Maclellan, J.A., in delivering the judgment of the Court, pointed out that it was left uncertain whether the interest was to be given for 90 per cent. or 10 per cent. of the purchase money, and equally uncertain whether the interest on credit should be short or long, and for these reasons the contract was held to be incomplete and unenforceable.

In *Wardell v. Williams*, 62 Mich. 50, a contract for the sale of a farm at a fixed price provided that a portion of the purchase money should be paid by the giving of a mortgage. The agreement further stated that the farm had been divided into lots; that the parties were to agree to the price of each lot; and that the purchaser should be bound upon payment of the amount so fixed as the value of each lot, to the discharge of any lot the value of which was less than the amount so fixed. The Court held that this contract was incomplete and unenforceable, in the absence of an agreement as to the price of the several lots. Again in *Gates v. Nelles*, 52 Mich. 1, a contract for the sale of an interest in a business provided that the price contained a provision that the purchaser should give "sufficient security for the payment of an indebtedness incurred in the business and of the purchase price." This was

and unenforceable agreement, because it is not the result of negotiations and agreement as to the security to be given.

At the fact that the purchaser took possession, and retained it for a time for the purpose, affects the rights of the parties. Possibly the machine was tested pursuant to the agreement made between the parties: it is in my opinion, to be ascribed to an implied agreement the price named in the contract or at a price stated in *Wittkowsky v. Wasson*, though the machine has been delivered to the vendee under a contract complete, it is still constructively in the hands of the vendor, having provided that there should be a time to be fixed by themselves by subsequent agreement, it is possible for the Court to substitute itself for them, making for them an agreement which they have made for themselves, to determine either what time there shall be or that there shall be no period.

There was no completed contract between the parties, therefore plaintiff's action fails.

The defendant, however, did not reject the machine upon the ground there was no contract, but insisted on other grounds to establish. It is impossible to say what the plaintiff would have taken had the defendant asserted that there was no completed contract, as it was merely mentioned in the course of the County Court Judge. The defendant's grounds were what were his main grounds of defence. He retained the machine for an undue length of time, and, though the contract was complete and binding upon him, he violated his agreement not to do so, but he gave the plaintiff an opportunity to demonstrate its capacity required of it. Having regard to all the circumstances, it would appear to be equitable that neither party should bear any costs of the action. But plaintiff, who originally opposed defendant's appeal, should bear the costs of the appeal to defendant.

RIDDELL, J.

JULY 12TH, 1907.

CHAMBERS.

RE TORONTO AND NIAGARA POWER CO. AND WEBB.

Costs—Payment out of Court—Money Paid in by Company for their own Convenience—Railway Act—Lands Acquired by Company—Vesting Order.

Motion for payment out of a sum in Court and for costs against the company.

W. E. Middleton, for the applicants.

McQuesten, Hamilton, for the company.

RIDDELL, J.:—The late John Webb, in September, 1890, bought, and from thence to the time of his death was in continued, absolute, and uninterrupted possession of certain land in the township of Saltfleet. He died in 1892, having made his will, whereby, after appointing his sons John Edward and George Frederick Webb and one Robert Reuben Morgan, executors and trustees, he directed that his said trustees should "at such time or times and in such manner as they may think fit, sell . . . such part of . . . real . . . estate as shall be necessary . . ." and pay debts, etc. The remainder of his real estate was devised to his trustees in trust for his wife for life, and thereafter to his children, with a direction that the trustees might, upon request of the wife, at their discretion, sell any part, and that after her death they might sell and divide the proceeds.

The Toronto and Niagara Power Company were incorporated by the Dominion Act 2 Edw. VII. ch. 107; their Act made applicable to their undertaking, secs. 136-169 of the Railway Act, 1888, i.e., 51 Vict. ch. 29 (D.) The company made an agreement with the trustees to buy a portion of the land for \$1,500, but, not being satisfied with the title, they paid this sum into Court under sec. 167 of the Railway Act of 1888.

Application is now made for the payment out of this sum to the persons entitled and for the costs to be paid by the company. The company do not oppose the payment out, but ask that the costs be paid by the applicants; and

ask for a vesting order. I do not think a necessary, as sec. 167 (R. S. C. 1906 ch. 37. provides that the "agreement shall be deemed of the company to the land therein men-

n Re Canadian Pacific R. W. Co. and Byrne, and that the rule laid down by the Chancellor P. R. 84, is still applicable in cases to formerly applied. And here the company, their own purposes, which land they might owners would not or could not make a valid their own purposes, and not for the advancement to the purchase price of the land, to Court. I think that the company must his motion. In my view the payment of casual motion such as this, is a very trifling for the extraordinary powers given to this

JULY 12TH, 1907.

CHAMBERS.

DIEHL AND CARRETT.

*ers — Bondholders — Priorities—Scheme
ment—Bondholder Attacking—Leave to
against Receivers.*

Clement for an order authorizing him to against the receivers of the Imperial Paper Limited, in the circumstances mentioned

, for the applicant.

for the receivers.

K.C., and Frank McCarthy, for two sets

-The Imperial Paper Mills of Canada, company incorporated under the provisions of Companies Act.

On 5th October, 1903, the directors of the company, a by-law, No. 52, for an issue of bonds to the amount of £200,000, to be secured by a mortgage. This by-law was sanctioned by the shareholders on 16th November, 1903, and the bond issue was accordingly made. The applicant, Clement, is the holder of bonds of that issue, of the value of £2,000.

A meeting of the holders of the bonds of this issue was called for Monday 8th April, 1907, at the offices of the company, No. 62 London Wall, London, England, to consider and if approved to pass, a resolution consenting, on behalf of all the holders of the bonds of the said issue, to the creation and issue by the company of mortgage debentures for the aggregate sum of £400,000, to be secured by a mortgage upon all the property comprised in the indenture of mortgage securing the £200,000 issue, in priority to that indenture securing the bonds thereby secured.

This meeting passed the resolution by a unanimous vote of those present at the meeting: these held £120,800 of the bonds. From the minutes it is clear that Clement, the applicant, said to be an American, was not present.

One Adolf Diehl, who also was not present at the meeting, thereupon brought an action in the High Court of Justice in England, on behalf of himself and all other holders of the said bond issue, against the company and the directors, and in that action asked for an injunction. The motion for an injunction seeking to restrain the issue of the proposed bonds in priority to the bonds for £200,000 coming due in March, 1907, before Mr. Justice Swinfen Eady, was turned into a motion for judgment, and judgment was given that the company, with the consent of a bare majority of the value of the bond holders, given at a meeting duly convened, might issue bonds forming or creating a lien upon the property contained in the mortgage of 18th November, 1903, in priority to or *pari passu* with the bonds secured by the mortgage.

Clement is not alleged to have been a party to, or interested in, this action.

In October, 1906, Diehl and another, suing on behalf of themselves and all other bond holders of the company, began an action in this Court against certain persons named in the mortgage and the company, asking to have it declared that the mortgage constitutes a charge upon all the property of the

therein, and for payment, foreclosure, or for or manager was also claimed. In this was made by this Court 27th October, 26th 19th January and 30th May, 1907, whereby, John Craig and George Edwards are constituted managers of the company until 1st Sep-

men, with the trustees under the deed of 1903, are said to be actively engaged in carrying out whereby the mortgage of November, 1903, and to a new debt to be created.

asks to be allowed to bring an action for a breach of his rights, and to restrain the receivers and the company from consenting, etc., to assist in the carrying out of the mortgage already referred to. It is scarcely denied that if the case goes through, the result will be that the mortgage is, if not the whole, at least a substantial

approved by the Court upon applications of this kind, as set down by Lord Justice Turner in *Randfield v. G. F. & J.* 766, at p. 722, as follows:

"I apprehend, according to the course of the law, that a party is at liberty to try a right which is claimed against him, and that it is perfectly clear that there is no ground for the claim." This, so far as I know, has never been said on the contrary, it is expressly adopted and followed (afterwards Lord) Justice Chitty in *Lane v. G. F. & J.* 3 Ch. 411, at p. 414. And the same rule is followed in some of the United States Courts, as in *Mass. v. Parker*, 111 Mass. 508, at p. 511, where it is said that to bring such an action, when applied to by the Court of Chancery as of course, unless there is no foundation for the claim."

and here that "it is perfectly clear that there is no foundation for the claim?"

claimed that a bare majority of creditors have the power to destroy the securities of the minority of creditors, and can only be obtained by the consent of the majority. I do not intend to be, and I think I have every right of respect for Mr. Justice Swaifen that I cannot find that it is perfectly clear that there is no foundation for the claim that Clement de-

sires to advance. Anything that that very able Judge say must be received with the utmost respect; but I think would himself be the last to say that his judgment is correct. That being so, I am of opinion that the application should be granted.

The costs will be disposed of by the trial Judge in his action to be begun, or upon application to me in my Chamber.

RIDDELL, J.

JULY 13TH,

CHAMBERS.

SWITZER v. SWITZER.

Husband and Wife—Alimony—Interim Alimony and Disbursements—Marriage Admitted—Separation Agreement—Adultery—Foreign Divorce.

Appeal by defendant from order of local Judge at Edmonton directing payment by defendant to plaintiff of interim alimony and disbursements.

W. E. Middleton, for defendant.

G. H. Kilmer, for plaintiff.

RIDDELL, J.:—This is an action for alimony and for relief. The marriage is admitted, but it is contended by the defendant: (a) that a separation agreement entered into between the parties concludes plaintiff; (b) that plaintiff is guilty of adultery with a person named; (c) that a decree of divorce has been obtained from a Court in North Dakota.

Plaintiff answers these contentions by saying that the alleged separation agreement is not binding upon her as it was obtained by pressure and executed under fear of further ill-treatment, and that in any case the fact that defendant has gone through a form of marriage with and is now cohabiting with another woman named relieves her from the covenants in the deed: *Morall v. Morall*, 6 P. D. 98. Plaintiff denies the adultery, and says that the decree for divorce is invalid.

to interim alimony and disbursements stated by Meredith, J., in *Atwood v. Atwood*, at p. 51: "The marriage being admitted, the plaintiff being proved, the plaintiff is entitled to interim alimony and costs." It is true that Judge disagreed in the result of that case with his brother Judge, but I do not think it can be found with the rule laid down by him. The court, rightly said that the granting or refusing of such support rests largely in the sound discretion of the court, the sound judicial discretion:" S. C.,

in a deed whereby the wife gives up all her interest in the circumstances shewn in the case of *Lafrance*, 18 P. R. 62, a decision by the court, it must be remembered, was the Judge with whom Ferguson, J. (disagreeing with the majority) agreed in the *Atwood* case. In the *Atwood* case of such a document is admitted, but its validity is questioned—no affidavits shewing fraud or duress to the Chancellor on the appeal. That case, however, is distinguishable from the case under consideration.

is denied, and that cannot be tried upon

North Dakota divorce, it would appear that, in the case of *Lafrance*, the defendant remained in Manitoba, and came to Bruce in the summer of 1905. He then went to North Dakota, and remained there for about a year. At that time he gave instructions to his attorney to obtain a divorce. He had, when living in Manitoba, been in North Dakota for some months, and, as he says, was engaged in the horse business. He seems to have obtained, in 1905, a declaration of intention to become a citizen of the United States. The separation took place in

In 1906, he seems to have obtained a decree of divorce from the District Court of that State, without the wife being present upon his wife and in her absence. He was

there is a completed contract and what the contract was because the consideration of the entire correspondence made it manifest that, although the price was fixed by the amounts of the deferred payments and the dates at which the same should become payable were left to be subsequently agreed upon by the parties, that it was held that there was in fact, no completed agreement between them.

I can see no distinction in principle between such a case and the present, where the memorandum of the contract itself shews upon its face that the amounts and due dates of the deferred payments were left to be settled by subsequent negotiations, and the subsequent letters of the plaintiff shew that this was his understanding of the situation.

McGibbon v. Charlton, decided in the Court of Appeal for Ontario on 24th December, 1902, and not reported (1 O. W. R. 828), is a decision to the like effect. In that case the price was ascertained, but the agreement, as found, provided that payment should be made within 90 days of the shipment, or, if the purchasers desired more than one part, interest was to be paid on such part after the first 90 days. MacLennan, J.A., in delivering the judgment of the Court, pointed out that it was left uncertain whether the price was to be given for 90 per cent. or 10 per cent. of the purchase money, and equally uncertain whether the price on credit should be short or long, and for these reasons the contract was held to be incomplete and unenforceable.

In *Wardell v. Williams*, 62 Mich. 50, a contract for the sale of a farm at a fixed price provided that a portion of the purchase money should be paid by the giving of a mortgage. The agreement further stated that the farm had been divided into lots; that the parties were to agree to the valuation of each lot; and that the purchaser should be required to pay upon payment of the amount so fixed as the value of each lot, to the discharge of any lot the value of which was so fixed. The Court held that this contract was incomplete and unenforceable, in the absence of an agreement as to the value of the several lots. Again in *Gates v. Nelles*, 52 Mich. 1, a contract for the sale of an interest in a business at a fixed price contained a provision that the purchaser should give "sufficient security for the payment of an indebtedness incurred in the business and of the purchase price." This was

and unenforceable agreement, because it was the result of negotiations and agreement as to the security to be given.

On the fact that the purchaser took possession of the machine, and retained it for a time for the purpose of testing it, it affects the rights of the parties. Possibly the machine was tested pursuant to an agreement made between the parties: it may, in my opinion, be ascribed to an implied agreement that the price named in the contract or at a price stated in *Wittkowsky v. Wasson*, though the machine had been delivered to the vendee under a contract, it is still constructively in the possession of the plaintiff, having provided that there should be a price to be fixed by themselves by subsequent agreement. It is possible for the Court to substitute itself for the parties in making for them an agreement which they might make for themselves, to determine either what price shall be or that there shall be no period for fixing the price.

There was no completed contract between the parties, and the plaintiff's action therefore fails.

The defendant, however, did not reject the machine upon the ground that there was no contract, but insisted on other grounds to establish. It is impossible to say what the plaintiff would have taken had the defendant rejected that there was no completed contract, as merely mentioned in the course of the trial by the County Court Judge. The defendant did not state what were his main grounds of defence. He alleged that the machine for an undue length of time, and, though it had been complete and binding upon him, he was not bound by his agreement not to do so, but he was given an opportunity to demonstrate its capabilities required of it. Having regard to all the circumstances, it would appear to be equitable that neither party should bear the costs of the action. But plaintiff, who opposed defendant's appeal, should bear the costs to defendant.

in Bruce county, Ontario, at the time the divorce was granted, and had been for some time before—indeed, he was visiting from time to time the woman with whom he afterwards went through the form of marriage. . . .

I decline to consider a decree for divorce obtained in that way, and by a person so situated, a valid answer in facie to an application such as this.

The appeal from the order of the local Judge as to interim alimony and disbursements will be dismissed, and that the amount of interim disbursements shall be at \$95. Costs to plaintiff in any event.

THE
O WEEKLY REPORTER

TORONTO, SEPTEMBER 5, 1907. No. 15

JULY 13TH, 1907.

WEEKLY COURT.

RE SHAFER.

*-Benefit Certificate—Direction of Assured as
n of Fund—Construction of Policy—Division
and Children—Income—Corpus—Vested In-
application of Doctrine in Regard to Wills—
Authority—Following Known Decision—Judi-
sec. 81 (2)—“Deem”—Costs.*

by Daniel L. Shafer for an order directing
of the moneys arising from a policy upon the
Alfred Shafer, deceased, be paid over forth-

tleton, for the applicant.

son, for the widow of George Alfred Shafer.
for the Toronto General Trusts Corporation,

eron, for the infants.

.-The late George Alfred Shafer was in-
cient Order of United Workmen for \$2,000,
he certificate being as follows: “Two thou-
which sum shall, at his death, be paid to his
e put at interest. Interest to be paid to his
e Shafer, for benefit of herself and children.
f his wife marrying again or in case of her
to be paid to his children until the youngest

become of age, when principal is to be equally divided among them." He died in 1894, intestate, leaving him the said Mary Jane Shafer and 5 children, all of whom are still living, 2 being still under the age of 21 years. Powers of administration were granted to the Toronto General Trusts Corporation, and in the capacity of administrators they received the said sum of \$2,000. Ever since that time they have been paying interest on this sum at 4 per cent. to the said Mary Jane Shafer.

This application is to be decided upon the strict legal rights of the parties, independent of any transfer or agreement.

The application is by Daniel L. Shafer, the eldest son of the deceased, and is substantially for "an order directing that the said Mary Jane Shafer and her 5 children be entitled to a proportionate share of the above-named Daniel L. Shafer's estate, the sum of \$2,000 held by the Toronto General Trusts Corporation, as administrators of the estate of . . . George L. Shafer, deceased, be paid over forthwith unto the said Daniel L. Shafer." This is opposed by the widow of the deceased, as official guardian acting for the infants. The other 4 children do not seem to have been served; at all events they were not represented by counsel.

Were it a question of interpreting a will, as in *Re Yuart*, I am advised I think that the application should, upon the terms as to costs, etc., succeed. The provisions of the will, if they were contained in a will, would have the effect of directing to divide the interest equally among the said Mary Jane and her 5 children. . . .

[Reference to *Jubber v. Jubber*, 9 Sim. 503; *Trusts*, 3 De G. & J. 195.]

Had this, then, been the case of a will, I think that each of the 5 children would have a vested interest in the income to the extent of one-sixth and in the corpus to the extent of one-fifth. Then the rule of *Saunders v. Vautier* (Cr. & Ph. 240, 4 Beav. 115, would probably be applied (see *Re Yuart*, ante p. 373), and the said Mary Jane would be held entitled to receive the one-sixth of the income and one-thirtieth upon the death or marriage of her 5 children.

But that result flows from two principles (the two in essence are in reality only one): (1) that the interest in the corpus is vested; and (2) that a legatee is not bound to wait for the expiration of the period to which the payment of his legacy is postponed, if he has an absolute right to it.

the legacy: see per Lord Langdale, M.R., 6, and compare what is said by the same in *Curtis v. Lukin*, 5 Beav. 155. And this legacy is actually given to the legatee, and payment is merely directory as to the gift: see per Shadwell, V.-C., in *Jos. Sim.* at p. 66. It will be seen that the *Vautier* flows from the doctrine of vesting

to inquire as to the difference in the rules of vesting of legacies of personalty, based as they are on common law, and ultimately on the civil law, and the rules governing the vesting of a devise of realty, payable out of the proceeds of land, based on common law. The difference in these rules is due to the difference of the law of personal property and real property, due to the claims of the Church of England, "which has had the effect of dividing the English law of property into two halves" (Maitland, *History of English Law*, 2d ed., Eward I., vol. 1, pp. 107, 108).

Whether the same rules as to vesting apply to legacies as in the case of a will has received some consideration in the Courts of England and Ireland. . . .

[*Hubert v. Parsons*, 2 Ves. Sr. 261, 263.]

It is mainly of importance in deciding that the same rules as to vesting in cases under a will are not applicable to cases under a deed. . . .

and quotations from *Burges v. Mawby*, 10 Ves. 401; *Robell v. Prescott*, 15 Ves. 500; *Stephens v. Stephens*, 15 Ves. 297, 309; *In re Orme* (1851), 1 Ir. Ch. R. 153; *In re Brunton* (1866), 17 Ir. Ch. R. 153, 154; *Trufts* (1858), 7 Ir. Ch. R. 344.]

It is thus at length to these cases in order to inquire, whether the same rules as to vesting apply to legacies of an instrument which derives its force from the civil law, such as a deed, as in an instrument which derives its force from the ecclesiastical law, as a will. It is seen that the Courts have laid down different rules, and the question is far from being settled.

In the particular case in hand we have a decision in

In *In re McKellar*, 21 C. L. T. Occ. N. 381, the cellor held that it is not "desirable to incorporate somewhat technical and not always satisfactory doctrines into the vesting of legacies into these policies of insurance." In this case, it is true, is not quite the same as the present case, the principle upon which it is decided is plainly stated.

The statute, Ontario Judicature Act, sec. 81 (1) provides: "It shall not be competent for the High Court or any Judge thereof in any case . . . to disregard or depart from any prior known decision of any Court or Judge of competent authority on any question of law . . . without the concurrence of the . . . Judge who gave the decision." If the Court or Judge deems the decision previously given to be wrong and of sufficient importance to be considered by a higher Court, such Court or Judge may refer the question to such higher Court."

"Deem the decision to be wrong" does not mean to create a suspicion that the decision may be wrong." It must mean something in the nature of a doom or judgment, and, in view of the cases in Chancery in England, notwithstanding the persuasive reasoning of the Irish Judges of the Rolls, say that my mind is so clearly convinced that the law to deem, doom, or adjudge the decision of the Court in *McKellar* to be wrong. Such being the state of my mind, I am bound by this decision, and I follow it.

The plain intention of the deceased, as expressed in his policy of insurance, is: (1) that the fund shall be so as to produce a revenue; (2) that until the death or marriage of his wife the interest shall be given to the wife for the benefit of herself and her children; (3) that after the death or marriage of his wife the interest is to be divided among the children, the corpus being kept invested until the youngest is of full age; and (4) that the corpus shall be divided equally among his children.

If there were any doubt that the beneficiaries should receive equally, that is settled by the Insurance Act, 1897 ch. 203, sec. 159 (7).

How, in the case of the death of any of the children, the interest, or, at the time for distribution, the corpus of the estate, is to be divided, are matters which the testator did not consider—at all events he has made no express provision for that event. This will, of course, depend upon the interest taken by each child of the deceased. As a

Hubber v. Jubber, so here such an inquiry may be pursued when the exigency arises. It is to be decided is as to the present right of the plaintiff that I decide is that under the existing law the applicant is entitled to one-sixth of the profits of the year, and that he is not entitled to be paid out of the corpus.

The plaintiff will pay the costs of all parties; and these costs will be lien upon the money (interest or principal) which may be or become entitled from this application been granted, I think I should order the plaintiff to pay the costs—it is for his advantage.

JUNE 28TH, 1907.

C.A.

CANADIAN PACIFIC R. W. CO.

and Consequent Death of Person Attacked on Track—Negligence—Failure to Give Warning of Train—Findings of Jury—Advised that he Ran into Train—Contribution of Action by Father and Administrator—Pecuniary Loss—Nonsuit.

Plaintiffs from order of a Divisional Court dismissing a motion to set aside the verdict for plaintiff for \$2,000 in an action by plaintiff for damages for the death of his son by negligence of defendants in running one of their trains over a farm belonging to plaintiff in the town of ... The jury found that defendants were negligent by not giving proper warning on approaching, and the Divisional Court (MacGillivray), held that there was evidence sufficient to support the verdict. The deceased was a lad of 18 years of age, son of the plaintiff's farm; he was running down a hill when the train ran over him or he ran into the train. The learned judge (MacGillivray) was of opinion that on the facts the deceased (after the injury which

caused his death) that he heard the train coming and could not stop, and as a consequence of the train, there was nothing to leave to the jury. Motion for a nonsuit should have prevailed.

The appeal was heard by MOSS, C.J.O., OSLER, MACLAREN, MEREDITH, J.J.A.

G. T. Blackstock, K.C., and Angus MacMure, defendants.

M. J. O'Reilly, Hamilton, for plaintiff.

MEREDITH, J.A.:—As I view this case, there are just 3 questions involved in it, namely: (1) whether there is any reasonable evidence to support the finding of the jury that the neglect to ring the bell and sound the whistle was the cause of the accident; (2) whether there is any such evidence to support their finding that the defendant was not guilty of contributory negligence; and (3) whether there was any such evidence of any pecuniary loss to the plaintiff.

It may be, and must be, very difficult for many people to think that one who did not hear the sound of a steam train, within a few feet of him, on a still morning, with other sounds interfering, would have heard the sound of a whistle at least 80 rods away, or the ringing of a whistle whilst swiftly passing that distance. The roar of a train under such circumstances, is, as every one knows, that it is extremely difficult, if not quite impossible, that any one having the sense of hearing, and acting on it with a view to self-preservation at a railway crossing, should fail to hear it. But one's mind may be so abstracted as to fail to observe it, and yet the shrill sound of the whistle, even the sound of the bell, might possibly awaken the mind to a sense of danger from the on-coming train. It is not, therefore, to be said that the case ought not to have been put to the jury at all, that plaintiff ought to have been successful on this ground.

But I cannot think there was any sort of reasonable ground upon which the jury could find that the defendant was guilty of contributory negligence. A youth—19 years of age, in possession of all his faculties, ran into a passing train at day time, and was almost necessarily seriously wounded. One circumstance, in his favour was that it was

so misty as to prevent plaintiff from seeing though he was about 25 yards away from it. The mist is made pretty plain by his testimony—apparently such an object as a telegraph pole distinguished at the distance of about 75 yards. The mist was no excuse for not seeing, or for not being very much nearer than 75 yards, or for not being only, away from it. Indeed it was a mistake in not giving the crossing with more care, depending on hearing, when sight was thus dimmed. A little later than usual, and the youth was mistaken in his impression that it must have passed. The mistake was no excuse for any recklessness or want of ordinary care; nor was the fact that on this day—the train was a little later in passing than usual. However the youth's action is not excused for, there is no escape from the fact that he failed to use of ordinary care, in going into this crossing without having ascertained that he might have avoided his injury. It cannot be said that he was not bound to take any care, or that it was a parody of prudence to say that it was not his time of day, and to be informed by his senses that the train must have passed, and to say that he heard the whistle of a train which was approaching the crossing? It is not as if there were no other signs of the train, or of the vehicle, as well as the need for his mind to be taken up in the management of them. In my opinion, the action failed, and was dismissed.

The court's opinion that it failed on the third question was that it failed to recover only for pecuniary loss. The action has been dismissed if none were proved. It is not that nominal damages may be awarded when none are proved. And plaintiff's evidence not only failed to show pecuniary loss, but shewed that none could be recovered shall be, sustained by him. The story was that his son had been working for him and for the father, but was that there was a clearly understanding between them that the son was to have the father's death, and that in the meantime they were partners, and that the son was to get a share of the common fund. Such a bargain

made with a stranger would surely be much in favour of the stranger. It would be a very easy thing to get full grown and experienced farmers to enter into such a bargain; so that, looked at purely from a money point of view, on plaintiff's own shewing, he has sustained no loss; he can, doubtless, make much better terms with more competent men; but, of course, he would not make the like terms with them; it was only because it was his own son that he gave him such an advantage.

On these two grounds, I would allow the appeal and dismiss the action.

Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 28TH, 1907.

C.A.

McKAY v. WABASH R. R. CO.

Railway—Injury to and Consequent Death of Engine-Driver—Intersecting Railway Lines—Collision of Trains—Negligence of Servants of Railway Company—Disregard of Rules—Signals—Findings of Jury—Judge's Charge—Contributory Negligence—Action under Fatal Accidents Act—Damages.

Appeal by defendants from judgment of MACMAHON, J., in favour of plaintiffs, for the recovery of \$10,000 damages, upon the findings of a jury, in an action by the widow of one John McKay, brought on her own behalf and on behalf of her two infant children, to recover from defendants, under the Fatal Accidents Act, damages for the death of her husband.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. E. Rose, for defendants.

T. C. Robinette, K. C., and J. M. Godfrey, for plaintiff.

Moss, C.J.O.:—John McKay was an engine-driver in the employ of the Canadian Pacific Railway Company. On 24th August, 1906, a collision occurred between a train belonging to the defendants and a train belonging to the Canadian Pacific Railway Company, of which the deceased was the engine-driver, resulting in his death. The accident occurred at a place near the city of St. Thomas where one of the lines of the Grand Trunk Railway Company, over which the defendants have running privileges, and the line of the Canadian Pacific Railway Company cross each other at rail level. In the vicinity of the crossing in question the direction of the line of the Grand Trunk is approximately east and west, and that of the Canadian Pacific is approximately north and south.

On the morning of the accident the defendants' train was proceeding westerly from the Niagara river to St. Thomas, and the Canadian Pacific train was proceeding from St. Thomas northerly to Woodstock. By sec. 225 of the Railway Act, 3 Edw. VII. ch. 58 (now sec. 277 of R. S. C. 1906 ch. 37) it was enacted that "no train or engine or electric car shall pass over any crossing where two main lines of railway or the main tracks of any branch lines cross each other at rail level . . . until a proper signal has been received by the conductor or engineer in charge of such train or engine, from a competent person or watchman in charge of such crossing, that the way is clear." And by sec. 226 (now sec. 278 of R. S. C. 1906 ch. 37) it was enacted that "every engine, train, or electric car shall before it passes over any such crossing as in the last preceding section mentioned be brought to a full stop: provided that whenever there is in use at any such crossing an interlocking switch and signal system or other device which . . . renders it safe. . . ."

In this case there was no interlocking system or device, and the proviso does not apply. On the Canadian Pacific line there were two semaphores, called distance semaphores, situate one on each side of the crossing, the one nearest to St. Thomas being about 815 feet to the south of the crossing, and the one to the north being about 936 feet from the crossing; about 415 feet from the semaphore to the south of and about 400 feet from the coping was a post with a board with the word "stop" painted upon it, spoken of in the evidence as the "stop post." Almost immediately at the

point where the two railway lines cross was a semaphore called the home semaphore.

On the Grand Trunk line were also two distance semaphores protecting the crossing, one on each side of the crossing, the one to the east being about 893 feet from the crossing, the one to the west being about 703 feet from the crossing. Semaphore posts intervened between these semaphores and the crossing. All these semaphores were operated by a signalman in the employ of the Grand Trunk Railway Company. It is his duty to see that no train on either line passes the crossing unless the line is clear, and the distance semaphores upon the other line are set against the movement of a train upon it. When the distance semaphore is lowered on the Grand Trunk line, a train may move forward towards the crossing, but may not pass it unless the home signal is lowered. When a train on one line is passing the crossing, the distance semaphores and home semaphores are set against trains on the other line. The plaintiff in this action alleged that while the Canadian Pacific train of which the deceased was the engineer was passing the crossing, the signals being in its favor, the defendants' employees in charge of the distance semaphores disregarding the signals of the distance and home semaphores which were set against them, neglected to lower them to bring the train to a stop, and on the contrary neglected to allow it to proceed, thereby coming into collision with the Canadian Pacific train and causing the injuries to the deceased which resulted in his death.

The defendants pleaded the general issue, vouching to the truth of sec. 242 of the Railway Act, 1903, 3 Edw. VII. ch. 58. At the trial contended, among other defences, that the death of the deceased was caused by or was owing to a breach of his part of sec. 226 of the Act and of a rule of the Canadian Pacific Railway Co. requiring him to stop his train at a stop post, and also that he was guilty of contributory negligence apart from the Act and the Canadian Pacific Railway Co.'s rule. The evidence at the trial shewed that the Canadian Pacific train left the St. Thomas station in the forenoon, and, after some delay or partial stop at a semaphore called the yard limit signal, it proceeded towards the distance semaphore situate 815 feet from the crossing in question.

There was a conflict of testimony as to whether the train came to a full stop at this semaphore. The conductor, fireman, and brakesman of the train swore positively

and they were corroborated to some extent by the messenger, who was in the baggage car. There was the testimony of two male and two female witnesses on the train and two lads who were engaged in digging and gathering potatoes in a field between the crossing and the railway at a point to the west of and between 100 and 200 feet distant from the distance semaphore. The witnesses swore that the train made no stop between the crossing and the distance semaphore, but one of them remembered the train stopping for the distance semaphore, and that the train was off the crossing and the brakes applied as the train was passing the distance semaphore. The testimony of the young ladies went no further than to say that they could not recollect the train stopping. The lads stated that the train did not stop, but admitted that as it approached the distance semaphore it slowed down until it was going just as slowly as it could go and still be moving. Hare, the signalman, who lowered the distance and home signals, testified that the line was open for the Canadian Pacific train to proceed, said that looking up the line he thought it was moving. All this evidence, which, together with a few additional circumstances, was fully presented to the jury by the plaintiff's counsel, was not sufficient to displace the plain defendant's evidence that the train hands and the express messenger were more or less directly interested in the stopping of the train.

On the whole a fair preponderance of testimony indicates that the train did stop at the distance semaphore. The testimony of the witnesses on the semaphores the train proceeded on, and the fact that the line being clear according to the signal, the line was open at the same time both the distance and home signals were lowered, the line used by the defendants' trains were not sufficient to displace the plain defendant's evidence that the approach of any train to the crossing was not sufficient to displace the plain defendant's evidence. The evidence is conclusive that there was an entire reliance on the plain defendant's train, which was in charge of the defendants' train, which was running with the Canadian Pacific train, of the collision. The train running at a high rate of speed, without stopping at the distance semaphore without stopping, and coming together at the crossing. Considerable time was spent in endeavouring to ascertain whether the train had struck the Canadian Pacific train or was not. The view of the negligence of the defendants' train was clearly established against the defen-

dants, it does not appear to be very material one way or the other, except perhaps as bearing to some slight extent on the defendants' contention with regard to the alleged breach by the deceased of the Canadian Pacific Railway Company's rules.

There was no doubt that the deceased met his death through the trains coming into collision, and the question was, to whose negligence was the accident attributable? There were proved at the trial and put in copies of the rules of the Canadian Pacific Railway Company and of certain circulars issued to the men. Among the rules are the following:—

"98 (c) Unless there is an interlocking plant in operation, trains must stop and receive proceed signals from signalman before passing over a drawbridge or a railway crossing at grade. The back view of a fixed signal at such a point does not govern the movement of a train."

"98 (d) Passenger trains must not exceed a speed of 12 miles, and other trains a speed of 8 miles, per hour, over railway crossings at grade and drawbridges."

Among the directions contained in a circular issued on 1st May, 1905, the following occurs: "The following instructions concerning standard stop post and slow posts are issued for the guidance of all concerned: Standard stop posts placed 400 feet from railway crossings at grade and drawbridges where interlocking plants are not in operation are indications of points at which trains are required to come to a stop and be governed by rule (98 c)."

At the conclusion of the plaintiff's case and again at the close of the whole case, a motion was made on behalf of the defendants to dismiss the action, on the ground that it appeared that the deceased did not stop the Canadian Pacific train before coming to the crossing, and it was submitted that, even if the train was stopped at the distance semaphore, the rules and directions of the circular required the deceased to again stop his train at the stop post, and his breach of duty in that regard was the cause of the accident.

The trial Judge overruled the motion, and the case was submitted to the jury on questions, which, with the answers thereto, are as follows:—

"(1) Did the Canadian Pacific train stop at the semaphore before proceeding to cross the Grand Trunk track at the diamond? A. Yes.

distance semaphore signal and the semaphore diamond lowered for the Canadian Pacific the Grand Trunk track? A. Yes.

speed did the Canadian Pacific train travel semaphore to the Grand Trunk crossing? per hour."

distance semaphore signal on the Grand semaphore signal at the crossing against as it came down the grade? A. Yes.

rate of speed was the Wabash train run- semaphore? At the distance semaphore 9 miles per hour at the diamond.

engine of the Wabash train strike the Canadian Pacific engine strike? A. Wabash struck the Canadian Pacific

injury to John McKay from which he died collision? A. Yes.

Wabash train had stopped at the semaphore, have occurred? A. No.

defendants the Wabash Railroad Company sum do you assess the damages? A. Dam- \$10,000 to plaintiff Ada McKay, \$3,000 to Roy- \$10,000 to Harold McKay."

entered for the plaintiff in accordance s.

real it was contended for the defendants: arguments of the jury were against the evidence evidence; (2) that the trial Judge's charge accurate in its references to the evidence had them; (3) that the deceased was guilty 226 of the Railway Act of 1903, or of the Canadian Pacific Railway Company, or of both, as misdirection on this point; (4) that, he was guilty of contributory negligence; damages were excessive.

question was mainly directed to the question Canadian Pacific train stopped at the distance its speed when approaching the crossing. the fair preponderance of evidence is in the finding on the question of stopping. established that the train did stop, there is that it could not develop a speed of more

than 10 or 12 miles an hour in the 815 feet between semaphore and the crossing.

As to the second objection; notwithstanding the criticism to which Mr. Rose subjected the charge, objectionable has been made to appear. Nothing was omitted to which serious objection can be taken. On the request of counsel for the defendants, the Judge commented his observations to the jury, and made some explanations, in order to make clear the bearing of remarks which he had made to the testimony of some of the witnesses, and it was quite open to him to comment on the jury as he did upon the testimony.

Throughout he manifested an earnest desire to lay before the jury fully and fairly as to the issues presented for their decision. And in afterwards considering his charge, it will be well not to forget Lord Hatherley's observation, which was as appropriate to-day as when made 30 years ago, that it is not fair to criticize every line and letter of a summing-up which has been delivered by a Judge in trying a case.

The 3rd and 4th objections are more serious and important, and were quite properly most earnestly presented to our attention.

The evidence shews that the long distance semaphore was placed protecting the crossing on the line of railway used by the defendants' trains were situated the one to the east and the one to the west 703 feet, from the crossing, and that these with the home semaphore at the crossing were the only guards in use. The distance semaphores were the points at which the trains on that line did stop before proceeding on to the crossing.

It is not improper therefore to conclude that the distance at which they were placed were reasonable distances at which trains were to stop in compliance with sec. 226 of the Railway Act. On the Canadian Pacific line the distance semaphore to the south of the crossing was 815 feet, and that to the north was 936 feet from the crossing, and there is no reason for saying that a stop at these points would not be a reasonable compliance with sec. 226. The Court found that the train on which the deceased was killed stopped at the distance semaphore about 815 feet from the crossing. For what reason should it stop again before making the crossing, provided the signals were in its favour? It is provided that rule 98 (c) and the directions of the circular are obligatory to stop again at the stop post. But they

(c) is nothing more than a paraphrase of sec. 226. It says, as in effect the statute here is no interlocking system trains must not proceed signal from the signalman before a railway crossing at grade. The meaning must stop before attempting to pass the crossing; they must remain at a standstill; they must not proceed until they receive a proceed signal from the signalman. The lowering of the semaphores, when being lowered, they are at liberty to proceed. The meaning of the circular is to be observed in the distance semaphores, and of a proceeding them to proceed from that point of crossing. They are obliged to stop once, and once, if after having stopped they receive a proceed signal. If they have not stopped at the distance semaphores, the stop posts at points at which they are to stop until they receive a proceed signal under rule 98 (c). In that case they come to a stop and be governed by the signal. If they stop at the distance semaphores, they receive a proceed signal, there is nothing requiring them to stop. The proceed signal continues. This reading is in harmony with the practice which provides all the protection which sec. 226 calls for. All that is necessary.

and that the train stopped at the distance semaphores from the crossing. It there received a proceed signal from the signalman. The requirements were thus complied with, and there was no fault again, unless, in the meantime, the home signal warned against it. But that did not happen. The train was continued. The signalman expected the train to go on and pass the crossing without further delay. On its appearance there was no reason why it should stop at the statutory speed and make the train guilty of no contravention of any of the rules. In acting as he did he was acting in accordance with the statute, and also abiding by the rules. The evidence goes to the jury of contributory negligence in the ordinary sense of the term.

One of the accidents was the reckless disregard of the defendants' employees in charge of

their train, and the jury have in effect so found, and the evidence which fully justifies their conclusions.

With regard to the damages; at first sight they appear large, but the evidence on this branch of the case is fuller and more satisfactory than is commonly met with in cases under the Fatal Injuries Act. The deceased was a young man in the prime of life, in good health, and industrious, and provident. He was in receipt of wages, with a prospect of improving for some years. Apart from the dangerous nature of his occupation, the jury were cautioned by the trial Judge against awarding the full measure of the actuarial computations as to the loss estimated with reference to the evidence as to the deceased's age, state of health, earning power, and prospects, and it is quite apparent that they took heed of this warning, otherwise their award would have been much larger. They were fully directed as to the basis on which the damages were to be estimated, and cautioned to make allowance for nothing but what appeared to be actual pecuniary loss. And finally their attention was pointedly called to the fact of the receipt by the plaintiff Ada MacKay of the proceeds of insurance policies to the amount of \$4,500, and they were directed to take that fact into consideration in making allowance for it. In these respects the jury followed the rules and principles enunciated in *Grand v. R. W. Co. v. Jennings*, 13 App. Cas. 800.

Having regard to the whole evidence bearing on this branch of the case, and considering what would have been the deceased's reasonable prospects of life, work, and remuneration, and how far these, if realized, would have been reduced to the benefit of his widow and children, it can fairly be said that the jury have taken into consideration the topics which they ought not to have taken into consideration, or have been influenced by any improper considerations, or have miscalculated, or that the amount they have awarded is at all so out of proportion to the circumstances as to be justified by the evidence as to make it proper to interfere with the award.

The appeal should be dismissed with costs.

OSLER, GARROW, and MACLAREN, J.J.A., concurred.

MEREDITH, J.A., dissented.

THE
WEEKLY REPORTER

TO, SEPTEMBER 12, 1907. No. 16

JULY 12TH, 1907.

DIVISIONAL COURT.

INSURANCE CO. v. DUNCOMBE.

*—Bond for Fidelity of Agent of Insur-
Advances to Agent and Premiums not
ruction of Bond—Application to Exist-
between Agent and Company—Withhold-
Information as to Material Facts—Re-*

stiffs from judgment of BRITTON, J.,
missing the action.

ch, Dutton, for plaintiffs, appellants.

C., for defendant T. H. Duncombe, the

of the Court (MEREDITH, C.J., MAC-
J.), was delivered by

*—The action is upon a bond entered
ent and R. L. Duncombe, an agent of
the appellants, bearing date 8th May,
obligors became bound to the appellants
things, R. L. Duncombe would well and
his duties as agent of the appellants, and
truly pay over "all moneys which he now
ay owe said company, or for which he
id company on account of loans or ad-
R. L. Duncombe during the continuance*

of the present agency of said R. L. Duncombe any future agency agreement, either joint or severally, for the purpose of enlarging his business or otherwise, and the same shall have been advanced under the terms of the agency agreement between said R. L. Duncombe and his company or any future agreement, or otherwise, to any third person at his request, and whether said R. L. Duncombe shall have made any express promise to do so or otherwise."

R. L. Duncombe had been appointed agent of appellants on 11th September, 1905, and an agency agreement of that date had been entered into between him and the appellants; that agreement was modified by another agreement bearing the same date, and another agreement on 8th November, 1905, and another on 29th January, 1906, and the last of these agreements was the one in force when the bond was entered into.

The claim of the appellants is made up of \$1,000 premiums alleged to have been received by R. L. Duncombe as the agent, between 14th March, 1906, and 11th May, 1906, and \$900, advances alleged to have been made to him on 8th November, 1905, and 7th May, 1906 (statement of 29th January, 1906).

This statement shews that at the date of the agreement of 29th January, 1906, Duncombe, the agent, was indebted to the appellants in \$650 for advances, that \$75 was paid to him on that day, and \$175 in three sums of \$50, \$75, subsequently.

Two grounds of defence are set up by the appellants and have been given effect to by my brother Brice.

(1) That the terms of the bond do not cover advances made prior to 29th January, 1906.

(2) That the failure of the appellants to disclose to the respondent the fact that the person whose fidelity was undertaken to be answerable for, was then indebted to the appellants in the sum of \$650, was a concealment of facts which should have been disclosed, and that the respondent is therefore entitled to repudiate the obligation entered into by him.

Dealing with the first ground of defence, I am of opinion that the terms of the bond cover the amount of the appellants' liability for the premiums and the advances on and after 29th January, 1906.

brother Britton that no liability was
 respondent in respect of any transaction
 between him and the appellants prior to 29th
 May. I understand my learned brother's
 to differ from him in thinking, as I do,
 that the advances made were advances
 on the bond. The evidence taken under
 the bond shows that the advances were those which
 the life insurance companies to their agents,
 in part, at least, to keep the agent in
 possession of the credit which he might give to
 be insured for payment of their premiums.
 Any of these advances may not properly
 be ascribed to the agent for "the purpose of en-
 richment or otherwise." They may be de-
 scribed, I think, as made for the purpose
 of the agent's business, for it is manifest that
 the credit he was in a position to give to his
 clients in the business he reasonably might expect
 to do not fall within that part of the de-
 fence which is covered, I think, by the words,
 "If made in connection with the agency,
 they were, it would be, I think, an unwar-
 rantable application of the ejusdem generis rule to apply
 to them."

Ground of defence failing, is the respondent
 bound on the second ground?

Is it to agree with the conclusion of my brother
 that there was anything in the conduct of the appel-
 lants in dealing with the respondent that should have
 relieved him from the obligation entered into

The respondent knew, as the letter from R. L. Duncombe
 of May, 1906, shews, that R. L. Duncombe had
 at that time, at all events, an agent of the appellants,
 and had just made a new contract with the appel-
 lants. The new contract referred to was a modification of
 the contract of 29th January, 1906, and was entered into on
 16th. The terms of the bond which the respondent
 shewed him that he was becoming bound for a
 discharge of the indebtedness of the agent, if he was then
 an agent of the appellants. It was not the appellants but R.
 Duncombe who requested the respondent to become a

party to the bond, and there was no communication in reference to it between the appellants and the respondent. It may be suspected, though I do not think it is proved, that Herbert S. Duncombe suggested to R. L. Duncombe that he should procure the respondent to take Herbert S. Duncombe's place as surety to the appellants. That the latter was desirous of being relieved of his obligation on the bond is shewn, but it is not shewn that it was because of any apprehension on his part as to the condition of R. L. Duncombe's account with the appellants, but, even if it were, I fail to see how the appellants can be affected by anything done by Herbert S. Duncombe to serve his own purposes, and when not acting for the appellants or in their interest; nor do I understand on what principle the fact that he was a vice-president of the company, and its solicitor, would warrant the Court in imputing notice to the appellants of the motives actuating him in endeavouring to get himself replaced as surety by the respondent.

The circumstance that when the payment was being made to the agent for the stock of the company owned by him, his indebtedness to the company was not deducted, is relied on by my brother Britton as indicative of some fraudulent intention in regard to the respondent. Again, it seems to me the answer to that is that the stock transaction was not one between the appellants and R. L. Duncombe, but between the latter and Herbert S. Duncombe, and there is no evidence—whatever one might be inclined to suspect—that the appellants, or, for that matter, that Herbert S. Duncombe, had any idea that the account of R. L. Duncombe was not in a satisfactory condition or that the advances made to him would not be repaid in due course, or that, knowing this, the respondent was substituted as surety for Herbert S. Duncombe in order that he might escape from the liability he had incurred as surety.

In my opinion, there was no duty resting on the appellants to communicate to the respondent the fact that Herbert S. Duncombe had been the surety for R. L. Duncombe, and that the respondent was taking his place and Herbert S. Duncombe was being relieved from his liability, or that the appointment of R. L. Duncombe as agent had originally been made before the appointment of 29th January, 1906, or that there was a current account between the agent and the appellants in which he was a debtor to the appellants for advances

made to him for the purpose of his business. As I have already pointed out, the respondent knew that there had been a previous agency to that in respect of which his bond was entered into, and I cannot think that the non-communication of the fact that advances had been made to the agent under previous agreements, which had not been repaid to the extent of \$450, there being nothing to shew that the agent was in default in respect of these advances, has the effect of entitling the respondent to repudiate liability on his bond.

The appellants are, in my opinion, entitled to judgment for the amount of the premiums received by R. L. Duncombe after 29th January, 1906, and not accounted for, and paid to the appellants, and for so much of the advances made on or after that date, as have not been repaid. According to the statement A., the premiums amount to \$75.72, and the advances to \$250.

The appeal will therefore be allowed with costs, and, instead of the judgment entered by the trial Judge, judgment will be entered for the appellants for \$325.72 with full costs.

In form the judgment will be for the penalty named in the bond and costs, and the damages for the breaches assigned assessed at the sum I have named.

ANGLIN, J.

JULY 18TH, 1907.

TRIAL.

LAIRD v. NEELIN.

Assessment and Taxes—Tax Sale—Valid Assessment—Irregularities—Collector's Returns not Verified by Oath—Late Return—Non-compliance with Provisions of Assessment Act—Sale of Lands not Included in List Furnished by Treasurer to Clerk—Failure to Redeem within One Year after Sale—Curative Provision of Statute—Special Acts—Setting aside Sale.

Action to set aside a tax sale and treasurer's deed of lot number 9 on the north side of Bay street in the town of Port Arthur to the defendant Neelin. The sale took place

on 4th November, 1896. The deed was dated 18th November, 1897. This action was begun on 29th June, 1898.

G. H. Watson, K.C., and W. McBrady, Port Arthur, plaintiffs.

F. H. Keefer, Port Arthur, for defendants.

ANGLIN, J.:—The sale was had for alleged a local improvement rates for the year 1890, amounting to \$3.10, and of general taxes for the year 1890, amounting to \$2.45.

In their statement of defence the defendants alleged that the transfer of the property in question from defendant Neelin, himself a transferee from Neelin, to one Graham was made bona fide purchaser for value without notice of the claim. Graham is not a party to this action. The defendants failed to sustain this plea.

The plaintiff made no attempt to shew that the improvement rates for 1890 were not properly imposed. He made an effort to shew that there was some irregularity in the specification of the items of general taxation for the year 1895, which seems to me not very material.

It was shewn that the collector's returns for the years 1890 and 1895 were not verified by oath, as required by sec. 132 of 55 Vict. ch. 48, and that the return in the latter year was over 7 months late. The provisions of secs. 142, 143, 150, and 162, of the same statute, which require that the returns have been entirely ignored by the officials of the municipality, and other minor irregularities were also proven.

Section 163 forbids the sale of any lands which have not been included in the list furnished by the treasurer and clerk of the municipality, pursuant to sec. 140 of the same Act. That the impeached sale was had in direct violation of this prohibition is not controverted. But it is contended by the defendants that the provisions of sec. 188 of the Municipal Assessment Act of 1892 (sec. 208 of ch. 224, 55 Vict., 1897), bar the plaintiff's action, because he failed to redeem the lands within one year after the sale. That section reads as follows: "If any tax in respect of any lands sold by the treasurer, in pursuance of and under the authority of this Act, has been due for the third year or more years preceding the sale thereof, and the same is not redeemed within one year after the said sale, such sale and the offer thereof to the purchaser of any such lands (provided that

onducted) shall be final and binding upon of said lands, and upon all persons claim-der them—it being intended by this Act land shall be required to pay the arrears n within the period of 3 years, or redeem ne year after the treasurer's sale thereof."

Donovan v. Hogan, 15 A. R. 432, 445.] did not plead this section; neither did he e to shew that the sale was openly and

ed by authority, I should incline to hold assessment has been admitted or proven, ed have been unpaid for over 3 years since a sale had for such taxes would fall within ion of sec. 188, notwithstanding non-com-quirements of secs. 140 et seq. This view mended itself to Osler, J.A., in Kennan . R. 560, 563, 2 O. W. R. 239, but is not later decision of a Divisional Court in O. L. R. 56, 61, 3 O. W. R. 167. Though he observation made upon them by Osler, er authorities the opinion is expressed that nly to sales made in conformity with the e statute, and does not validate sales made f sec. 163 (sec. 176 of ch. 224, R. S. O. . Tait, 32 O. R. 274, 283, 2 O. L. R. 307; 26 O. R. 453; Deverill v. Coe, 11 O. R. v. Somers, 13 O. R. 600. See also Carter L. R. 310, 319, 9 O. W. R. 58.

also relies upon the special Acts 63 Vict. 1 Edw. VII. ch. 65, sec. 2. The former ttan v. Burk held insufficient to cure such n shewn in this case The action was begun statute was enacted, and it expressly ex-eration sales questioned in pending litiga-

ade on behalf of the defendants Neelin and cleration of lien under sec. 198 of 55 Vict.

sale and deed must, therefore, be set aside sts to be paid to the plaintiff by the defend- Campbell.

ANGLIN, J.

JULY 1

TRIAL.

STEVENSON v. CAMERON.

*Deed—Rectification—Conveyance of More Land than
Intended — Unilateral Mistake no Ground for
Fraud—Knowledge of Purchaser of Intention
—Importunity—Absence of Independent Advice*

Action for the rectification of two conveyances from the plaintiff to defendants on 18th July, 1906. The conveyances consisted of two lots known as numbers 9 and 10, which, according to the registered plan, had a frontage on Gore street of 133 feet by a depth of 165 feet, the width of way of the Canadian Pacific Railway. The plaintiff had been the owner of these lots for something over 20 years. The defendants were desirous of acquiring the lots for the purpose, amongst others, of erecting an hotel upon lot 9, fronting on Gore street. The plaintiff sought the rectification in respect of a strip of land crossing the rear of the lots, and varying in width from 26 feet at the rear to 100 feet at the east. This strip of land, according to the plaintiff's contention, she expressly excepted from the lots conveyed to the defendants. She based her claim for rectification on the grounds of mistake and fraud.

F. H. Keefer, Port Arthur, for plaintiff.

G. H. Watson, K.C., and W. A. Matheson, Port Arthur, for defendants.

ANGLIN, J.:—The strip of land in the rear of the lots has for many years been used as a means of access for the plaintiff to the station of the Canadian Pacific Railway Company. The plaintiff, Fore William. This strip, the plaintiff alleges, had been owned since dead, some 20 years ago, agreed on her behalf to transfer to the railway company, who then erected and maintained the fence separating it from the remainder of lots 9 and 10.

It was perfectly clear upon the evidence that a mistake which may have existed as to the description of the lots in the conveyances was entirely on the part of the plaintiff herself. So far as the defendants were concerned

deeds in question should be drawn to cover. The mistake, therefore, being unilateral, not obtain rectification on that ground. This is necessary to consider whether or not the evidence supports the plaintiff's claim that the execution of the deeds was procured by fraud on the part of

the defendants intended to acquire the property for their own reasons of their own they approached the defendant Cameron alone were to be the interest of the defendant Flannigan was an agent to acquire the property for him.

of the negotiations was some few days prior to 1906. There is some uncertainty upon the part of defendant Flannigan, who conducted the negotiations, saw her twice or oftener before the sale was actually signed. According to the plaintiff, he probably paid her at least 3 visits in connection of the agreement. According to his own statement he saw her twice. He says that on the first occasion was discussed except the question of price—said as to the dimensions of the property; on a second occasion, he was accompanied by one who was to take the management of the hotel to be conveyed to the property, and that then there was nothing discussed as to the dimensions of the property to be conveyed, or as to the Canadian Pacific Railway Company's question. Upon the occasion on which the deed was executed, 14th April, Flannigan says that there was no discussion as to the frontage or depth of the property, but that nothing was said as to any rights in the property of the Canadian Pacific Railway Company in respect of the rear portion, however, that, on the occasion when Black and White Mrs. Stevenson told them that there was a right of way, and that some agreement respecting this had been entered into by herself or her husband with the Council, under which this lane was to be kept open for the use of the public. He says that she could not give any definite information about this agreement, nor as to its precise terms or effect. On the occasion of the execution of the agreement, he says, she again spoke of the lane being left open for the public use, and in that connection referred to a piece of Edward street which she had bought. Mr. Cameron's evidence as to what took

place on the occasion of the execution of the agreement—the only time when he saw the plaintiff—was that the age and depth of the property were then referred to, and that there was some discussion between plaintiff and defendant Flannigan about some part of the lots which the plaintiff had reserved for street purposes. He says that there was no reference in this connection to any interest of the Canadian Pacific Railway Company.

Mrs. Stevenson, on the other hand, swears that at her first interview with the defendant Flannigan, who was admittedly acting on behalf of himself and his co-defendant Cameron, she made it clear to him that she intended to convey only so much of the lots numbered 9 and 10 as lay to the north of the strip of land in question, informing him that she could not convey the southerly strip because of an agreement between her husband and the Canadian Pacific Railway Company, made many years ago, whereby that company was to acquire that strip in exchange for a portion of Edward street to which the company had acquired title by a by-law of the municipal corporation of Neebing. She explained the subsequent conveyance from the corporation to her husband to carry out such by-law. She does not profess to know the plain details fully to Flannigan the precise nature of the agreement with the Canadian Pacific Railway Company, but she explained the mode in which that company acquired their interest in the strip of land in question. But she is emphatic in her statement that on every occasion—and she says there were several occasions—on which the matter was discussed before the agreement for sale was signed, she made it perfectly clear to Flannigan that she did not consider herself able to give title to the rear strip, and intended to sell and convey only the front portion of the lot, having an approximate depth of 125 feet. She says that on the occasion on which the agreement was executed Flannigan referred to the fact that the depth of the lots was about 133 feet, and that she then stated that the depth would be about 125 feet, but that she was not sure of it and would have her son measure it. She further says that, in discussing the boundaries of the property to be sold, the fence, which appears to have been erected by the plaintiff's thing over 20 years ago by the Canadian Pacific Railway Company, separating the strip in question from the lots to which she alleges she intended to sell to defendant, was referred to; that this fence stood in this position for

and was a landmark which the defendant Flannigan had overlooked, seems beyond question.

Stevenson's daughter Jennie was present at one interview between the plaintiff and the defendant Flannigan at the execution of the agreement, and also during the interview on the day on which the agreement was orally executed. She swears that on the former occasion she told Flannigan distinctly that she would not allow the land was inside the fence, as she had given to the Canadian Pacific Railway Company, and that on the latter occasion, when Flannigan referred to the depth of 133 feet, her mother told him that she thought the depth was 1,125 feet, but was not sure, and she got her son to measure it before the deed was executed. Flannigan, upon being confronted with these facts on cross-examination, contradicts them flatly. On no occasion did Mrs. Stevenson state that the land the fence had been given to the Canadian Pacific Railway Company; in fact, that no reference was made to any interest of the Canadian Pacific Railway Company in these lands.

What took place at the time of the execution of the agreement, he swears positively that there was no reference to the dimensions of the property, either as to width or depth. In regard to this latter occasion the testimony of Cameron contradicts that of Flannigan, and, at least, corroborates the testimony of Mrs. Stevenson and her daughter, because he says that both width and depth were mentioned, though he does not say that depth was spoken of as being approximately

He noted also that upon his examination for the execution of the agreement Flannigan had sworn that Cameron was not with him at the time the agreement was executed, and that in the witness's examination a contrary statement upon cross-examination. Upon explanation of this contradiction, the fact was that he had since satisfied him that he was present.

Stevenson and her daughter both say (though they do not say positively) that to the best of their recollection the agreement signed on 24th April was read over to Flannigan at that time. Flannigan at first refused to read over the typewritten portions of this agreement, upon being shewn the document, he went further and said that he had read over practically the whole

of it. Cameron, who, according to Flannigan's evidence and his own testimony, was present at the making of the agreement, cannot remember that any particular document was read by Flannigan to Mrs. Stevenson.

An independent witness, Harry Harkness, who, according to Flannigan's evidence, always has been and still is a personal friend of his, swore that about the time when Flannigan was contemplating buying this land and building the hotel, he approached Harkness desiring information as to the position of the Stevenson estate. Harkness told him that he told Flannigan that there had been a deal between Mrs. Stevenson and the Canadian Pacific Railway Company, in relation to the land; that Flannigan must be careful to buy the land between the two fences; that the Canadian Pacific Railway Company had got the rest. Later in the course of his evidence he said: "I told Flannigan that the reason the lots had been given to the Canadian Pacific Railway Company in exchange for a lot on the corner of Edward street was that, being confronted with these statements, Flannigan denied them and said that no such interview took place. The only time he saw Harkness was during the progress of the building of the hotel, and that Harkness on that occasion referred to the fence enclosing Edward street, which should be taken down, as Mrs. Stevenson did not own that property. He also said that he had never spoken to Flannigan about his intention to build the hotel.

When the agreement was executed on 24th April, 1900, money was paid on account of the purchase money. Mrs. Stevenson remained in this position, the defendants meantime commenced building, until 11th July, when, finding it necessary to secure a loan from a mortgage company, they went to obtain the deed. Flannigan again went to Mrs. Stevenson to inform her of their wish. According to the evidence of Mrs. Stevenson and her daughter, they sought to put the matter off until Mrs. Stevenson, who at the time was unable to feel able to go to Port Arthur to consult with her attorney, Mr. Keefer, and have him prepare the deed; but Flannigan pressing the matter, and suggesting that they should allow him to get his solicitor, Mr. Morris, to prepare the deed, Mrs. Stevenson yielded and consented that Mr. Morris should be instructed to draw the instrument. Mr. Flannigan, on the other hand, says that he suggested that Mrs. Stevenson should instruct Mr. Keefer to prepare the conveyance, but that, notwithstanding this suggestion

hed to have it prepared by Mr. Morris, and
ruct Mr. Morris to draw it up. Upon cross-
Stevenson and her daughter adhered firmly
t, as did Mr. Flannigan to his.

re prepared by Messrs. Morris & Babe, who
usly acted for Mrs. Stevenson, but were the
Flannigan; and, according to the evidence
on and her daughter, Mrs. Stevenson was
one message from Mr. Babe on the morning
, to attend at his office on that morning to
er reply being that she did not then feel
ould endeavour to go down at 4 o'clock in
Shortly afterwards, and between 11 and 12
orenoon, Mr. Babe and Mr. Flannigan at-
tevenson's house to secure the execution of
nother and daughter were both present, and
again they will not swear positively, that
struments were read over in their presence,
ere signed by Mrs. Stevenson without her
Mr. Babe's evidence is to the effect that it
om to read over deeds executed in his pres-
events, the material portions of them, and
his occasion he has a recollection of telling
hat the deeds she was about to execute were
Messrs. Cameron and Flannigan, and that
or a sum of \$2,750, the property described
e description he says he read in full. Be-
Babe intended to tell the truth to the best
n, I am, nevertheless, not satisfied that he
sion read over in full the descriptions of
ntained in these deeds. He seemed very
ss upon me the fact that it was his custom
so. My experience is that a witness who is
to his custom, has usually convinced him-
some particular occasion, as to which his
not been very distinct, he did in fact adhere
n the present instance, I incline to the view
d, as he states, tell Mrs. Stevenson that the
from herself to Messrs. Cameron and Flan-
probably also mentioned the consideration,
way,—for instance, as her property at the
nd Edward streets, or, in some such indefi-
ferred to the lands which were to be conveyed.
declined to pledge his oath that the deeds

or any part of them were read over to Mrs. Stevenson that, although he accompanied Mr. Babe, presumably for the purpose of seeing that the instruments were correct and thereupon paying over the money, he did not pay attention to this portion of the transaction.

Nothing further of any importance occurred until some time late in August, or in the month of September or October; the date was not at all definitely fixed. The evidence says that at some time during this period she was accompanied upon by her banker, Mr. Jarvis, who had the custody of her papers, accompanied by Mr. Taylor, an official of the Canadian Pacific Railway Company, who came to inquire into that she had conveyed to Messrs. Flannigan and Cameron the rear strip in which the Canadian Pacific Railway Company were interested. This fact had apparently been brought to the knowledge of Mr. Taylor, and he asked Mrs. Stevenson for an explanation about it. Mrs. Stevenson swears that she was then for the first time aware that in the deeds the lands conveyed were described differently than as she had intended they should be.

During the interval between this date and the date at which the present action was brought, plaintiff was endeavouring to secure a reconveyance of the south-western strip from Messrs. Cameron and Flannigan. Their attitude from the first appears to have been that there was no mistake made by Mrs. Stevenson in conveying the strip to them, but that they held it subject to a condition that it should be available for the purposes of a public highway. Indeed Mr. Flannigan is very positive in his evidence that throughout the negotiations it was stated by Mrs. Stevenson that her husband had made some sort of an arrangement with the municipality of the township of Neebing that this strip of land should be given for use as a public highway, and that it was a term of the bargain between Messrs. (Flannigan) and Mrs. Stevenson, that, although the strip should be included in the conveyance from Mrs. Stevenson, the grantee should keep the strip open as a public road or highway and should hold it subject to that condition. Cameron in his evidence said that in the month of October when Mrs. Stevenson saw him, complaining that the lands were not as she had intended they should be, she proposed to some other arrangement with the town for an extension of the rear part of her lots for some other land. At the time this action was brought the defendants' position

that they are willing to allow the land in as a public highway. . . .

ely a question of credibility as between her daughter on the one hand, and Mr. other.

Stevenson's demeanour on cross-examination irely satisfactory—yielding apparently to y, she sometimes declined to answer coun- ts explicitly, and once or twice said she matters upon which she answered quite estioned by Mr. Keefer,—on the whole I pressed with her testimony, and found ld justify a conclusion against her ver- appeared to be a modest young girl, very us of telling the truth to the best of her

be difficult to specify anything marked in nner of giving evidence, or his demeanour that would raise serious doubt as to his s has been pointed out, in direct conflict venson and her daughter on almost every heir testimony, as against his, is, in one ar, materially corroborated by the de- Flannigan's evidence also directly con- arkness. Against the reliability of this atever has been suggested, and he is en-

orthy that at least on one occasion, where nflict with both Mrs. Stevenson and her , Black, who was present and might have testimony, was not called. Black was in ring the trial. He was excluded at the s counsel while the evidence for defend- e was interested with the defendants in being the person who was to manage it gnificant circumstance that his testimony ourt.

so be noted the fact that there is a ma- tween Mr. Flannigan's evidence on dis- ence at the trial, and his explanation of is rather calculated to lead me to place testimony.

significant circumstance that, although mission there was some special condition

or term arranged between the defendants and Mrs. Stevenson with regard to the strip of land in question, no agreement is to be found either in the agreement or in the deeds which they procured her to sign. Although they admit that they agreed that this strip of land should be held by them in trust to some trust for its use as a public highway, the circumstances which they took vest this property in them as trustees and free from any condition whatever. On the whole, I am driven to the conclusion that in all respects in the testimony of either Flannigan or Cameron is in conformity with that of Mrs. Stevenson and her daughter, I must believe the former and accept the latter.

It only remains to consider whether, upon the facts as told by Mrs. Stevenson and her daughter, a sufficient case is made out for rectification upon the ground of fraud. It is not necessary to find that Messrs. Flannigan and Cameron designed to do Mrs. Stevenson any real harm or injury in this matter, and I acquit them of any such intent. I find that the legal title to the strip of land, as she told Flannigan, was trustee for the Canadian Pacific Railway Company. Flannigan, having an apparent beneficial interest in it. I think it quite probable that the defendants, appreciating this, thought it would be in a better position to deal with the Canadian Pacific Railway Company in respect of this strip of land, if they were vested in themselves, and that it would do no real injury if they included this land in the conveyance which they obtained from her, even though she could not intend that it should be so included.

At all events, I find as a fact upon the evidence that the plaintiff never did intend to convey the strip of land in question, and that the defendant Flannigan was aware of the fact at the outset that she intended to reserve it, and that the defendant Cameron is bound by the knowledge of the fact that Flannigan, whether it was communicated to him or not.

The taking of the agreement and conveyances in respect of this strip of land was, in these circumstances, in my opinion, fraudulent. Mrs. Stevenson was admittedly a sick woman at the time that the execution of the conveyances was procured. She had been very unwell for some time, and, according to her own story, was not quite fit to transact business when the sale agreement was signed. Through the whole transaction she had no independent advice, and I find that of allowing her to have the deeds prepared by her

the defendants induced her to allow their
e them, and Mr. Flannigan admits that
them what he now asserts to have been
there was some special bargain affecting
estion, by which it was to be held subject
c use.

re, the plaintiff is entitled to the relief
and that judgment must be pronounced
of the conveyances in question by limit-
ded in them, so as to exclude the strip
o the south of the fence, marked "right
pon the plan filed as exhibit number 2.

ll have her costs of this action.

JULY 19TH, 1907.

DIVISIONAL COURT.

AGARA FALLS CONCENTRATING CO.

*be Manufactured by Plaintiff—Refusal
o Accept—Statute of Frauds—Work and*

tiff from judgment of MAGEE, J., 9 O.

, for plaintiff.

or defendants.

f the Court (MEREDITH, C.J., TEETZEL,
s delivered by

:-The action is brought for the price
red by plaintiff for defendants. Among
up, defendants pleaded the Statute of
was given to that defence and the action

Plaintiff's contention upon the argument of was that the claim of the plaintiff was not for but for work and labour performed and material and that the Statute of Frauds had therefore no a

We do not find it necessary to consider the by the learned counsel for the plaintiff, for, as far concerned, the question has been conclusively by a decision of the Court of Appeal, Canada Engraving and Printing Co. v. Toronto R. W. Co. 462, and determined adversely to plaintiff's conte that case the plaintiffs were engravers and lith and the contract was with them for supplying t ants with certain bonds and coupons to be print plaintiffs, in a special form, with special wording by the defendants, upon paper purchased by the and one of the questions was as to the applicat Statute of Frauds to a contract of that kind.

I am unable to distinguish that case from t bar. I can see no difference between the supply bonds and coupons in that case and of the labe The bonds and coupons when completed were r hands of the plaintiffs saleable to any one but t ants except as waste paper, any more than are in this case in the hands of the plaintiff.

Nor do I think the case comes within the rule by Mr. Justice Stephen and Sir Frederick Pollock tract by which one person promises to make which when made will not be his absolute proper which the other person promises to pay for the v is a contract for work, although the payment may a price for the thing, and although the materials the thing is made may be supplied by the mal Quarterly, vol. 1, p. 10.

The appeal must be dismissed with costs.

JULY 31ST, 1907.

CHAMBERS.

REX v. CAPELLI.

Murder—Death Sentence—Reprieve—Criminal Code, sec. 1063.

prisoner under sec. 1063 of the Criminal Code, the accused for such period beyond the time expiration of the sentence as should be necessary for the case by the Crown. The prisoner, Marino, was tried at Parry Sound before the 28th and 29th May, 1907, for the murder of Marino. Marino was acquitted. Capelli was condemned to be hanged on 1st August, 1907. An application made on behalf of Capelli for the mercy of the Crown was disposed of on 24th July by the Attorney-General ordering that the law be allowed to run its course. This decision was not communicated to the prisoner until after the 27th July, and was made known to the prisoner on the evening of that day from the papers of the decision. It was alleged that the prisoner had not had such full consideration of the facts, as the accused could present them, as would enable the Minister of Justice to determine, pursuant to sec. 1022 of the Criminal Code, that Capelli should have a new trial.

and H. L. Hoyles, for the prisoner.

the Attorney-General.

—I have read the evidence, and, while I am not as to whether the accused should get a reprieve, I think substantial justice requires that a reprieve should be granted. The law is that a reprieve may be granted by the Court whenever substantial justice requires. If the Minister of Justice has already fully considered the facts mentioned in the affidavit of Mr. Capelli, this application, it may be that nothing can be done by the short respite given to the prisoner, as the facts have not been properly presented for due consideration is due to the prisoner that the opportunity

be now given. It is important that the question of the Crown not calling the witness Robertson, and the fact that he be so, of the evidence of a person who was sick and unable to be procurable on behalf of the accused, should be considered. I am not unmindful of the fact that after the verdict the presumptions are against the innocence of the prisoner. I do not deal with the question of either guilt or innocence, but my decision is simply that the prisoner surely has the fullest opportunity for the presentation of, and a full hearing upon, all the facts which would go to shew that he is entitled to a new trial, and for this purpose I grant a stay of execution for 2 weeks, and order the execution to take place on 15th August, 1907, instead of the 1st, as sent for by the trial Judge.

THE
WEEKLY REPORTER

ONTARIO, SEPTEMBER 19, 1907. No. 17

AUGUST 26TH, 1907.

DIVISIONAL COURT.

GOODISON THRESHER CO.

*Threshing Outfit—Incapacity of Engine and
Part of Outfit — Contract — Warranty —
Warranty — Reduction in Purchase Money —
Payment into Court — Promissory Notes —*

Defendants from judgment of MAGEE, J.,
in favour of plaintiffs, as to part of the
an action by the purchasers of a threshing
n of the money paid and promissory notes
, and for damages for breach of the agree-

as heard by FALCONBRIDGE, C.J., BRIT-
L, J.

K.C., for defendants.

Barrie, for plaintiffs.

—This case was tried at great length, at
and with great care. A perusal of a good
pages of evidence, occasions great surprise
matter, so much one of business on the part
manufacturers of threshers, separators, en-
apparently so easily capable of settlement,
led between the parties. It also convinces

me that, whatever may be the legal difficulties in the way of plaintiffs to prevent recovery from defendants, if there are such, plaintiffs have acted in good faith in complaining, and have been put to considerable loss by reason of defendants not supplying plaintiffs with an engine, as part of a threshing and separating and cleaning outfit, which would do good work, according to the defendants' warranty.

The original agreement between the parties is dated 28th February, 1905, and is one of the very full, fine print agreements, framed as much in the interest of defendants as manufacturers as it could be. I do not think plaintiffs fully understood the full effect of the agreement as protecting them as limiting the liability of defendants; but plaintiffs did sign, and so defendants have, as they are entitled to have, the advantage of this instrument.

This action is not upon the warranty in the original agreement, but upon a distinctly new agreement, which it is alleged was subsequently made, and made by reason of the Goodison traction engine supplied under the original agreement failing to do good work.

Plaintiffs had certain rights under the original agreement; so of course had defendants. Defendants could have said they would leave plaintiffs to enforce their rights, and that they (defendants) would be liable only so far as they were made liable, if at all, by the original agreement. Defendants did, as I view the evidence, make a subsequent agreement.

The original purchase by plaintiffs was of a rebuilt McCloskey thresher, a Goodison traction 17 h.p. engine, and a Goodison side fan stacker, all fitted up, mounted, and thoroughly equipped, as particularly set out, and at the price of \$2,000; and if a Goodison "wind-stacker" was included, \$250 additional was to be paid therefor.

These machines were warranted by defendants to be well made, of good materials, durable, and with good care, proper usage, and skilful management to do as good work as any other of the same size manufactured in Canada. The case of the purchaser having trouble with the machine is provided for, at length and specifically. Then there is the proviso: "If the said machines do not work according to warranty, the said notes or moneys are to be refunded, and the purchasers shall have no claim for damages sustained by reason of the failure of the machine to satisfy this warranty."

The Goodison traction engine did not work satisfactorily. All that was done seems to be fully set out in the reasons for the judgment of the trial Judge.

Then on 23rd December, 1905, this agreement was made between defendant and plaintiff Edwin Bell: "We agree to repair your traction engine purchased from us the past season in either of the two ways hereinafter mentioned, to be decided by you:—

"(1). We will put a new cylinder on your engine with a new valve, repair the flues, and pay freight on the engine to the shop from your place, and also back again, all of the above being done free of charge.

"(2). We will put a new boiler on your engine with 7 foot flues and repair the engine, you to pay us \$150 and freight one way. We pay the freight the other way.

"You agree to accept either one of the above proposals, and to pay your payments according to the original contract.

"The John Goodison Thresher Co., Ltd.

"Accepted, Edwin Bell."

Mrs. Bell did not sign. A somewhat voluminous correspondence followed. Edwin Bell says he understood, and I think he did understand, that the \$150 was part of the price according to the original contract. Defendants intended that as extra for the new boiler, etc.

Nothing came of this proposed agreement. It apparently was never completed, either by its acceptance by Mrs. Bell, or by Edwin Bell electing which of the two things he would have done. I put that aside, except as shewing that defendants realized the necessity of something, and that plaintiffs had a right to relief.

Then a new agreement was made. This is shewn by the correspondence, beginning with defendants' letter of 24th March, 1906, in which reference is made to the agreement of 23rd December, 1905. Defendants ask for balance of payment according to original contract, assert that they are prepared to carry out their part of the agreement, and then say, "we now wish to know what is to be done in reference to this matter." They further say they are willing to carry out "either one of the proposals as made you," and wind up, "we await your further reply, and hope that you will get this matter arranged without further delay."

Plaintiffs' solicitor replied on 29th March, 1906. Defendants wrote to plaintiffs' solicitor on 31st March again, calling up the agreement or proposals of 23rd December. Plaintiffs' solicitor wrote to defendants on 5th April, 1906, submitting 3 proposals as to what was to be done with the engine.

Defendants wrote on 7th April to plaintiffs' solicitor, still adhering to the agreement of 23rd December, and ignoring or misunderstanding plaintiffs' proposals.

Plaintiffs' solicitor wrote to defendants on 20th April, stating: "He (Mr. Bell), expects you to fulfil your contract and provide him with an engine capable of producing 17 horse power in good running order, and in accordance with the contract on which the engine was first shipped . . . It must be distinctly understood that the engine when put in shape must be capable of developing 17 h.p., under the working conditions provided for in the original contract."

Defendants wrote to plaintiffs' solicitor on 23rd April, in part as follows: "Replying to your favour of the 20th, would say it will be necessary to have Mr. Bell's engine here not later than May 15th, but might state he has never advised us yet in which way he wants the engine repaired. . . . We shall be pleased to receive the balance of his payments at once, and advise how he wants his engine repaired, and if it will be here by 15th May, we will put the engine in shape as quickly as we possibly can."

Apart from what follows, that was an election by defendants for plaintiffs of the first rather than the second of the proposals in the proposed agreement of 23rd December. It was "to put the engine in shape" to do the work necessary in the outfit, for which plaintiffs were asked to pay.

On 1st May, defendants wrote to Edwin Bell, deprecating the necessity for correspondence with solicitors, and then said: "We intend doing what is right with you in every respect. . . . If you keep your present engine, and send it here near threshing time, we will be so busy that it will be almost impossible to get it out in time for you. . . . This engine should have been sent here some time ago—and while we were not too busy, and we would put it in shape and return promptly. . . . We shall be glad to hear by return mail and advise definitely just what time you propose shipping the engine . . . and at the same time advise us just exactly what you want done."

On 11th May the solicitor wrote to defendants as follows: "Mr. Edwin Bell has instructed us to state that he will ship the engine on the 21st of this month for the purpose of having you put it in running order, capable of developing the horse power called for by the contract and in other respects fulfil the terms and conditions of the contract. He does not presume to dictate to you what you should do, as he takes it for granted that you are better able to form a conclusion upon the matter than he is."

Defendants raise no further objection or question, but hope that Mr. Bell will arrange to ship the engine by the 21st, as promised.

Then further delay occurred about sending the engine—defendants consenting to this delay—and finally the engine was received by defendants on 5th July, 1906, and its receipt was acknowledged by letter of that day.

Defendants, by accepting the engine sent to them as I have stated, did so upon the agreement by them that they would put it in running order capable of developing 17 horse power, and that it would in other respects fulfil the terms and conditions of the original contract, viz., that with good care, proper usage, and skilful management, it would do as good work as any other of the same size manufactured in Canada, and if finally the engine (as part of the outfit) would not do as good work, etc., according to the warranty, the notes or moneys given are to be refunded, and the machines to be returned to defendants as provided.

The engine was, as defendants contend, repaired. They put it, as they contend, in "first class working order." According to their statement they did what they felt themselves obliged to do, and what, I think, was the least they could do under the circumstances, but unfortunately in the subsequent test of a practical working with good care, proper usage, and skilful management, it would not do good work. I think it is a perfectly fair inference, if not specifically proved, that the engine as repaired and returned to plaintiffs did not and would not do as good work as any other of the same size manufactured in Canada.

What took place after the return on 31st July, 1906, is fully and correctly set out in the reasons of the trial Judge, and I agree with the conclusions at which he has arrived, and I think there is ample evidence to warrant these conclusions.

There was nothing to prevent defendants making a new contract with plaintiffs, ancillary to the original contract altogether, in reference to the existing engine, the terms as to that engine, as to its fitness, and the work it would do, according to what was represented in the original contract. The engine had been manufactured by defendants or sold by them to plaintiffs, returned by plaintiffs to defendants pursuant to an engagement, to have work done on it; work was done upon it, all in the ordinary course of defendants' business. Such a contract need not be unimpeachable by defendants. That new contract was in the terms of the original to this extent, that the engine with the outfit then bought would do good work as described or as implied by the warranty incorporated in the former agreement. Such is the whole of all that has taken place in reference to this engine. It is not to be told that, although the engine did not do good work, and could not be made to do good work, that the threshing machine, thresher, separator, etc., purchased from defendants, cannot succeed because the engine was made of good materials and was of 17 horse power. I am satisfied from the evidence that this engine did get reasonably "good work" and reasonably "proper usage," and that with reasonable management, it did not do good work—not as good as the ordinary machine of same size made in Canada. It did not do good work as plaintiffs expected and had a right to expect from it.

This is not the case of merely buying a well defined article. It is the case of an arrangement made by defendants to purchase after it had arisen—a new agreement in reference to the taking—buying—of an article manufactured by defendants, supplied to plaintiffs, found by plaintiffs to be unfit, and subsequently admitted by defendants to be unfit, and returned by defendants, upon the consideration that plaintiffs would make it fit, undertook to make fit for a particular purpose. In this case there was complete knowledge by defendants of what the engine was for, even apart from the letter of the plaintiffs' solicitor of 11th May, 1906. That letter was in plain language as plaintiffs relied upon defendants' judgment, knowledge, and skill in the matter as manufacturers, and so there was the implied warranty that the engine when returned to defendants on 31st July, 1906, was fit for the use to which it was to be applied. I am not to conclude that any express warranty in the original contract can be invoked to exclude an implied warranty.

took place between the parties as to the en-

the opinion as above, I see no reason, upon ap-
 pears, for interfering with the decision of the
 it might well be argued that plaintiffs are en-
 than the relief given, but plaintiffs have not
 they are entitled to as much at least as the pre-
 gives them, so I think this appeal should be
 costs.

GE, C.J., gave reasons in writing for the same

, dissented, for reasons stated in writing.

AUGUST 26TH, 1907.

DIVISIONAL COURT.

BROWN v. DULMAGE.

*Contract — Failure to Carry out — Resale by
 Conversion — Possession — Purchase Money —
 Rescission — Damages — Costs.*

plaintiff from order of MABEE, J., in the
 allowing an appeal from the report of the
 ordinary finding that plaintiff was entitled to
 9 damages in an action for conversion.

was heard by FALCONBRIDGE, C.J., BRIT-
 ELL, J.

ins, K.C., for plaintiff.

nson, Goderich, for defendant.

J.:—On 28th May, 1903, the defendant en-
 contract with the plaintiff for the sale to him
 goods, &c., in Wingham. The agreement is in
 the important terms are as follows:—

tures, &c., in the Kent block to be sold at
 the dollar invoice price, any dispute to be re-

ferred back to the stock sheet. Deposit to be \$7,000, stock exceeds \$7,000, balance to be rated (sic) at 30¢ on the dollar. \$2,000 cash on completion of stock taking and checking. Balance in two and four months equity. If stock exceeds \$7,000, deal may be declared off.

In June the plaintiff "declared the purchase off" claiming that the stock exceeded \$7,000. He had, however, meantime paid \$1,000 on account of the purchase money.

He thereupon brought an action against the defendant, 2nd October, 1903, setting out that he had rescinded the contract, and that he had demanded the return of the \$1,000, and he claimed the sum of \$7,000 and interest from 5th June, 1903. The defendant denied the contract, the stock taking, and the exercise by the plaintiff of his option to purchase; that the plaintiff took possession of the stock and sold portions of it, and retained the proceeds of the portions so sold, and dealt with them in all respects as if he were the owner thereof; that subsequently plaintiff abandoned the possession of the goods, refused to complete the contract; that consequently the defendant notified plaintiff that he would proceed to sell the stock and hold him responsible for the loss and damages the defendant might sustain; that defendant did try to sell the stock en bloc and failed; and that he was now endeavouring to dispose of it by retail; that he was at all times ready and willing to carry out the agreement.

The case came on for trial before Meredith, J., at Barrie, 16th May, 1904: the trial Judge dismissed the action with costs: see *Brown v. Dulmage*, 4 O. W. R. 401. "without prejudice to any action the plaintiff may bring to bring, based upon the alleged wrongful act of defendant in selling the goods, or for an account of the proceeds of the sale." The trial Judge added: "I must not be taken to indicate that, in my opinion, any such action, on the facts of the case, is maintainable."

Then this action was brought, plaintiff alleging that the defendant had converted the goods, and that the contract, the delivery of the goods by defendant to plaintiff, and the payment of \$1,000 on account of the purchase money, and the conversion by the defendant of the stock, and the declaration that the defendant had so converted the stock, and damages for such conversion, and in the alternative an account by the defendant "if the Court should

the defendant rightly took possession" and to the plaintiff of the amount due and for

of defence admits the contract and the \$2,000, and denies all else; alleges that the defendant gave \$2,000 to the defendant on the completion of the contract and to give his promissory notes at that time, but neglected and refused to pay the \$2,000 and to give his notes; that the defendant took possession of the stock to the plaintiff, but never demand or claim possession thereof, and the defendant was always ready and willing to deliver the stock to the plaintiff upon payment of the price and the delivery of the said notes; that plaintiff was never entitled to possession, and cannot maintain any action for conversion. The defendant goes on to set out the sale of the goods after notice to the plaintiff; that such sale after payment of all the proper expenses by way of counterclaim, claims the difference between the net proceeds of the sale and the purchase price.

before my brother Clute at Barrie on the 19th of September, 1906, and, without declaring the rights of the plaintiff, an order was made referring "to the Master of the Court to inquire and state the true measure of damages to which the plaintiff is entitled and to take the oath as between the parties . . . ;" and the costs were reserved. The Master in his report with the reference 28th September, 1906, and a report of date 7th December, 1906, finds that the measure of damages to which the plaintiff is entitled is the value of the goods converted to his own use, less the sum of \$1,975.40, being the amount paid by the plaintiff for a portion of the same, and as to the balance remaining in his possession, the sum of \$2,830.60, from which I have deducted the purchase money still unpaid upon the goods, \$1,861.71," and further finding "that the plaintiff is entitled to the difference between the sum of \$2,830.60 and \$1,861.71, namely,

\$968.89, taken from this report, which came on for judgment on the 17th of January, 1907, and he set

aside the report, ordered that upon payment by the plaintiff to the defendant of the sum of \$207.31 and the costs of defence, including the costs of the reference and of the appeal, within 60 days, the defendant should deliver to the plaintiff the goods remaining in his possession, and, in default of such payment, the action should be dismissed with costs. The learned Judge seems to have turned the appeal into a motion for judgment—no objection is taken on that ground—indeed, it was agreed that we should treat the appeal to us as a motion for judgment. It was also agreed before us that upon the present appeal from the judgment of Mabee, J., all facts found by Meredith, C.J., in the former action, should be considered found in this action for the purpose of this motion for judgment.

The order in appeal, as I read it, is really an adjudication that the plaintiff had no right to bring this action, but it gives him a right—if he sees fit—to get the goods remaining in the hands of the defendant upon paying the costs of the action and the balance of the money after crediting the net sales thus:—

Purchase money		\$2,862.71
Less paid in cash by plaintiff	\$1,000.00	
Received in cash for goods sold	1,975.40	
	<hr/>	
	\$2,975.40	
Less expenses	320.00	
	<hr/>	
	\$2,655.40	2,655.40
		<hr/>
Balance due defendant		\$207.31

This is a privilege which could not, in my view of the case, be given the plaintiff without the consent of the defendant, but the defendant does not appeal.

It seems to me that this case will turn upon the question of fact; "Was the plaintiff entitled to the possession of the stock?" And incidentally the further question will arise: "Did the defendant actually deliver the stock to the plaintiff?"

It is to be noticed that the defendant has shifted his ground since the former action—in that action he asserted that he had delivered possession to the plaintiff, and the Chief Justice says: "If, as the defendant's pleadings seem

to shew, and as he offered some evidence to establish, the plaintiff had taken possession of the goods, then there may be a serious difficulty in the defendant's way. If so, then he was a mere wrongdoer in endeavouring to sell by auction." In this action, as will be seen, the plaintiff it is who is asserting that the goods were delivered to him, and the defendant is denying such delivery. The Chief Justice does not find that the goods were delivered, nor is his judgment rested, in whole or in part, on such delivery having taken place. This, then, seems to be an open question, and it must be decided upon the evidence taken before the Master in Ordinary, and the facts found by the Chief Justice in the former action. And the following are the facts as I find them to be:—

The defendant was carrying on business as a dry goods merchant in Wingham; he made the agreement spoken of on 20th May, 1903; shortly after the making of the agreement he closed the store and with the plaintiff started to take stock; the plaintiff paid \$1,000 on account of the purchase money; the goods were cased up by the defendant, and remained upon the premises of the defendant cased up, the plaintiff having bought all the goods, &c., in the store, "lock, stock, and barrel," as it is put, and these were left in the store where the defendant had been carrying on his business. These goods were intended to be sent to the plaintiff, when and where he secured a place of business, and the defendant was awaiting his instructions: but he found a difficulty in getting a place to enter into business. He is confronted with the difficulty that he would probably have to offer the goods again for sale as a job lot, and then attempted to "declare the deal off." The plaintiff had, however, actually sold \$1.25 worth of goods, and put the money in his pocket, and though the defendant, in the examination for discovery, contended that the plaintiff had taken possession of the goods the day he paid the \$1,000, which seems to have been the same day as he sold the \$1.25 worth of goods, it seems clear that he is simply giving his definition of what is "possession." Nothing is done by the plaintiff in the way of taking possession of any goods, except the trifling quantity he sold, and the goods were at all times upon the land of the defendant and in his actual possession.

On 20th June the plaintiff attempted to rescind the agreement by letter "declaring the deal off," demanding the return of his \$1,000, and saying that he expects wages

at say \$1.50 per day for helping to take stock. It held that he had not the right to rescind.

On 23rd June the solicitors for the defendant v plaintiff saying: "There is no doubt that you have purchased the goods and stock, and we therefore notify the same are here at your risk and expense, and we like to have you make some arrangement as to take them away." No answer having been received, the solicitors on 29th June again wrote: "We notify you that unless the stock and goods are taken away from his premises the stock and goods purchased by you from him on or before the 15th day of July, unless same are taken away by that date, we will be obliged to sell them and hold you responsible for the loss by him, if any, and also for all the charges and expenses occasioned by your failure to carry out the agreement, also for damages."

It would thus seem that the defendant was insisting that the contract was in full force—in any event the court's decision decides that the contract was not rescinded.

Then came a letter from the same solicitors, 1st July 1903, notifying the plaintiff that, as the time had expired for him to take away the goods, the same would be sold for the defendant, and the plaintiff held responsible for the difference, &c., and damages. Further correspondence followed, and on 1st August the defendant wrote the plaintiff that he would on Monday unpack the goods, and if the plaintiff did not move at once, the stock would be sold. This was attempted on 19th August, and failed, and the defendant upon defendant made sales over the counter. It was found that "the mode of selling which defendant adopted was reasonable and practically the only one open to him, and that which was calculated to realize the best price for the goods:" 4 O. W. R. at p. 92.

The Master has found that the amount of cash realized by the defendant in this way is \$1,975.40, and this is the subject of the dispute. But this is in excess of the value of the goods in that it required the use of a shop and of salesmen to realize this sum. The actual value of the goods sold was when the plaintiff declined to accept them, and the defendant undertook to sell them, must be the price or obtainable for them, less the reasonable cost of such price, and that my brother Mabee has fixed

and that this is a reasonable sum, if any allowance be made to the defendant for expenses, &c.

When, at the time of the alleged conversion is \$320, that is, \$1,655.40. The value of the goods may be more difficult to determine, but, in the course of the case, it is not necessary to consider it. If any value is to be placed upon these goods, a reasonable sum should be allowed for the expense of doing so on them. In any case, therefore, I think the plaintiff is not wrong. But it seems to me that no right can be claimed. The plaintiff did not pay the \$2,000—he paid it of it—even on his own contention, as shewn by the fact that at the trial of the former action, the other party deposited in the bank to be paid upon the ship's orders, and the time for the shipment of the goods arrived when he repudiated the agreement and withdrew the deposit. And in any case he did not give up the goods, having at any time any actual possession of them, nor ever acquired any right to the possession, as he never tendered the purchase money.

The plaintiff attempting to rescind the contract, the law leaves the courses open to the defendant:—

1. The rescission. In that case, the goods revert to the plaintiff; he is entitled to receive back his money. 2. The action—*as has been decided.*

3. The action on the contract—claiming that the goods are

4. The action for the rescission so far as to put an end to the contract, and claiming the right to sue for damages.

5. The action on the contract—claiming that the defendant, by his conduct, is to be taken as repudiating the contract, and that the plaintiff is entitled to sue for damages, although he may, perhaps, have mistaken his

The contract, then, is in full force, and the plaintiff is simply doing that which seems a natural thing in the circumstances, but which I do not say is or is not a conversion. When he takes the goods of the plaintiff, as in the present case, and sells them to pay himself the purchase money, with the proceeds thereof. But, as the plaintiff has no right to possession, he has no right to bring an action for the conversion alleged, without first paying or

tendering the amount of the purchase money, and placing himself in the position of being entitled to possession: *Milgate v. Kibble*, 3 M. & G. 100; *Moore v. 29 U. C. R.* 487, 490; *Butler v. Stanley*, 21 C. P. Blackburn on Sales; 28 Am. & Eng. Encyc. of Law p. 664.

But can he bring an action to recover back the money, or the part thereof paid down? Of course the defendant, as in *Moore v. Sibbald*, repudiated the contract and refused to deliver the goods on demand, he must return the instalment of purchase money. But, if that is the case, the law has been authoritatively laid down for the Judicial Committee in *Page v. Cowasjee Eduljee*, 12 P. C. 127, at pp. 145, 146, as follows: Lord Chelmsford, giving the judgment of the Court, says: "There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not return and pay the price, after receiving express notice from the vendor that, if he fail to do so, the goods will be resold. But the authorities are uniform on this point, that where, after actual delivery, the vendor resells the property, and the purchaser is in default, the resale will not authorize the vendor to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist payment of any balance of it which may be still due;" and that this is *a fortiori* where there has been a delivery and the vendor takes it out of the possession of the purchaser and resells it.

The law seems to be accurately stated in *Blackburn on Sales*, 2nd ed., at p. 459: "At all events it seems that a sale by the vendor, whilst the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price or to resist payment of any balance of it still due: nor yet so tortious as to deprive the vendor of his right to retain, and so entitle the purchaser to sue in trover." The last English edition of Benjamin on Sales, ch. 6, gives a large number of cases, but I do not think it necessary to do more than refer to that work, as the judgment of Lord Chelmsford in *Page v. Cowasjee Eduljee*, 12 P. C. 127, seems sufficient.

standing on their strict rights, as they do, I think this action cannot succeed, and that it should be dismissed with costs. The judgment appealed from dismisses the action with costs incurred by the plaintiff; and as to the provision introduced in the bill, as no appeal has been taken, I would not interfere, however, that the costs of this appeal should be added to the costs and purchase money to be paid by the defendant before he may exercise the option given in the bill. If the bill is not accepted by the plaintiff, it may be that the parties to consider the following. That upon the plaintiff tendering the balance of the purchase money and interest, he may possibly recover: *Chinery v. Veall*, 5 H. & N. 288; and it is at least doubtful, in view of the case in the *Ex parte*, of the judgment of the full Court in 29 U. C. R. at p. 452. If the bill lies, the result would be: the defendant

from June, 1903, (3 years, 10 months, and 10 days) at 5 per cent.—\$101.67)	1,191.67
0.85 and interest from Aug. 1, 1903, to Oct. 1, 1903, 8 months, at 5 per cent.—	509.84
0.85 and interest from Oct. 1, 1903, to Dec. 1, 1903, 2 months, at 5 per cent.—	506.25
	<hr/>
In all	\$2,207.76

any way at all, it would then seemingly lie in the hands of the court to award a sum of damages, as matters now appear to require, which would interfere with the findings of value by the jury.

Invested	\$1,975.40	
Interest, &c.	320.00	\$1,655.40
	<hr/>	
On hand	\$855.70	
Cost of selling		
(2/5 of \$320	128.00	727.20
	<hr/>	<hr/>
		\$2,382.60

Amount of purchase money
still unpaid

Balance

If the defendant would allow this sum, \$174.84, costs which the plaintiff is ordered to pay, and thereupon release his cause of action, it seems the merits of the case would best be served. If not, troublesome questions as to the real value of the goods must come up—and I am far from agreeing with the defendant—ter—and, in view of the finding of fact by the Master in the former action “that the net proceeds (over the counter) will fall considerably short of what remains due of the purchase money” (4 O. R. 100), the plaintiff will find great difficulty in the way of success—insuperable—in any attempt to prove that the value of the goods to which he would be entitled upon a tender of the purchase money was in excess of the balance of the purchase money.

I should perhaps add that, on the facts of this case, I think no special action would lie as for injury to the “reversion.”

FALCONBRIDGE, C.J., agreed with the judgment of the Master. DELL, J., for reasons stated in writing.

BRITTON, J., dissented, for reasons stated in writing.

CARTWRIGHT, MASTER.

AUGUST 30

CHAMBERS.

EASTWOOD v. HARLAN.

Writ of Summons—Service on Defendant Compulsorily—Rules 146, 159—Service on Clerk at Court Office—Service Brought to Knowledge of Compulsorily

Motion by defendants to set aside the service of summons, on the ground that it was not served as required by Rule 159.

G. C. Campbell, for defendants.

J. P. Crawford (Montgomery & Co.), for plaintiff.

—The motion is supported only by an affidavitants' stenographer. This states that no company were then in the city, but that she is the sheriff's officer that she was in charge of the instructions of the secretary, but that she is to be understood by him that she was a service could validly be effected.

In answer shews that, before the service on the defendants' solicitors had received writ and to see if they were to accept service, and they returned it, saying that they had no inservice attacked then was made, and the a conditional appearance without leave, as 173.

In argument that defendants desired time. easily been obtained without taking a step in practice, whatever may be the case in

service seems regular under Rule 159 (b), the issue of the writ has been known to de- ce 8th July, as appears by letter of the de- and the present motion is made on behalf and on their instructions.

circumstances, I think the motion cannot be dismissed with costs to plaintiff in

delivery of the statement of claim, the de- time for pleading, it can be granted on pro-

observed that the object of Rules 146 and that service, if not personal, shall be made it may be safely affirmed will bring the ce of the necessary parties. This has been and the motion is therefore useless.

CARTWRIGHT, MASTER.

SEPTEMBER 3

CHAMBERS.

COATES v. THE KING.

*Particulars — Petition of Right — Commission
Treasury Bills and Bonds — Names of Purchasers
Dates of Sales—Prices Paid—Particulars for Payment
Delay.*

Motion by defendant for particulars of certain paragraphs of the petition of right.

N. Ferrars Davidson, for defendant.

Featherston Aylesworth, for plaintiffs.

THE MASTER:—In this case the plaintiffs seek a sum of £3,000 or \$14,600, being one quarter of 1 per cent. on £1,200,000, the amount of certain bonds issued by the provincial government for the building of the Temiskaming Railway.

In the 8th paragraph of the petition of right the plaintiffs allege that under a memorandum of 10th October 1897, signed by the Hon. R. Harcourt, who at the time was Minister of the provincial government, and acted as counsel in the matter, it was agreed that the plaintiffs should purchase (1) the sale of treasury bills for £1,200,000, and the subsequent sale of the bonds to retire these bills should be intrusted to them. The bills were to be sold at a rate representing a rate of interest not exceeding 4 per cent. Nothing was said as to terms of the sale of the bonds.

In the following paragraph it is alleged that the bills were successfully sold at the prescribed rate, and in the 14th paragraph it is alleged that, at the request of the provincial Treasurer, these bills were, on 15th May, 1898, renewed for another 6 months, and sold by the plaintiff at the previous issue repaid with the proceeds.

The petition of right was filed on 22nd November 1898. It was stated on the argument that attempts had been made at settlement, so that the petition was not served until June.

the particulars were demanded, which have
But, as to those asked for in explanation of
14, the defendant has now moved for fur-

by Mr. Davidson that what was required
&c., of the persons to whom the first and
the treasury bills were sold. He argued
was based on the memorandum of 10th
was necessary for plaintiffs to allege, as
that they, as agents for the provincial gov-
the treasury bills; and that they must prove
ended that it might be that plaintiffs had
the purchasers, and that, in such case, they
to have been acting as agents, and so their
the sale of the bonds would be gone, as well
y charges in respect of the sale of the trea-

at such a defence is in contemplation, it
try to know how the fact is. Even if the
refused, yet such a defence could be pleaded,
the evidence could be obtained, though this
ommission to Great Britain.

s supported by the affidavit of the Provin-
at it is necessary for the proper defence of
particulars should be furnished, shewing the
s to the various purchasers, with the name
and the price paid.

Cockburn, 9 O. W. R. 883, affirmed 10 O.
ulars were ordered before delivery of state-
where it seemed that such particulars would
e defence.

reason I think the order should be made in

to the motion it was argued that delay
in this order. But it will not cost much to
d a reply can be received in 10 days there-

defence will be extended until a week after
been delivered, and the costs of the motion
ase.

CARTWRIGHT, MASTER.

SEPTEMBER 1

CHAMBERS.

BARRETT v. PERTH MUTUAL FIRE INSURANCE

Notice of Trial — Motion to Set aside — Irregularity of Place of Trial named in Statement of Claim — Trial named in Writ of Summons not Specially — Waiver of Irregularity — Costs.

Motion by defendants to set aside plaintiff's trial, in the circumstances mentioned in the judgment.

R. C. H. Cassels, for defendants.

C. A. Moss, for plaintiff.

THE MASTER:—This action was commenced by summons for special indorsement, and the place was named therein as Barrie: and this could not be done without an order. No place of trial was named in the statement of claim, as ought to have been done under the rules. But no objection was taken by the defendants, who appeared on their statement of defence, and the cause was adjourned before vacation.

On 4th September the plaintiff gave notice of the sittings commencing at Barrie on 16th September. The defendants at once moved to set it aside, "on the ground that no venue is laid in the statement of claim."

It was argued, on the one hand, that the notice in question was a nullity, as there was no more jurisdiction for naming Barrie than Sarnia or L'Orignal, as the action was not commenced by a specially indorsed writ, and, therefore, though that form was used, the mention of the place in the writ served could not be invoked in aid of the notice.

No case has been reported similar to the present. In the case of O'Brien v. Wells, 20 C. L. J. 369, is the nearest found. There the place of trial had been properly named in the statement of claim, but omitted in the notice, and a motion to set it aside as irregular was refused, on the absence of an affidavit that the applicant had been misled.

In answer to the present motion, it was conceded that the statement of claim was undoubtedly irregular. However, it was said was waived when the statement

AUGUST 31ST. 1907.

FE INSURANCE CO. v. DUNCOMBE.

ndant T. H. Duncombe for leave to appeal to
eal from the order of a Divisional Court, ante
aintiffs' appeal from judgment of BRITTON,
8.

Leitch, St. Thomas, for plaintiffs.

not appear to me to present such special cir-
justify the granting of leave to appeal to

this Court. Notwithstanding the form of the directed to be entered in the plaintiffs' favour, the assessed amount only to \$325.72, and it is admitted can be no further assessment of damages for breach of conditions of the bond sued on.

The sum of \$325.72 is, therefore, the amount in controversy in the appeal. There is no question involved in law or of fact, of general importance. The trial judge and the Divisional Court agree as to the period to which the award is to be confined. The difference of opinion between the two courts is as to the proper construction of the bond in regard to the amount of advances covered by the condition, and also as to the extent of the obligation of the plaintiffs to disclose to the surety the matters alleged to be material when he was becoming bound to the bond. Difference of opinion between the two courts would obviously not be, in itself, a sufficient ground for allowing a further appeal. But I do not think that there is any reasonable ground for doubting the soundness of the decision of the Divisional Court has been presented. Nor do I think that there is anything in the point suggested that there is in respect of which the surety became liable only on or after 7th May, 1906, to warrant further discussion.

I think the motion fails, and it must be dismissed with costs.

On the question of the plaintiffs' duty to make disclosure, reference may be made to *Niagara District Fruit & Produce Stock Co. v. Walker*, 26 S. C. R. 629, where *Railton v. Theatres*, 10 Cl. & F. 934, strongly relied upon by the defendant, was discussed, and *County of Simcoe v. Burton*, 25 S. C. R. 1, not previously referred to.

ANGLIN, J.

SEPTEMBER 12, 1906.

TRIAL.

CODVILLE GEORGESON CO. v. SMAR

Partnership — Ostensible Partnership — Infant Heir as Partner — Creditors of Ostensible Partnership — Plaintiff of Person Actually Carrying on Business — Plaintiff's Costs — Interpleader.

An action to recover a debt against defendant and for a declaration of the plaintiffs' right to rank in priority.

the hands of the defendant Humble, as sheriff, claim of defendant Green; and also an inter-

toun, Winnipeg, and P. E. Mackenzie, Ken-

, Port Arthur, for defendant Mary Green.

ivray, Kenora, for defendant John Smart.

-The plaintiffs are an incorporated company
ness in Winnipeg as wholesale grocers. The
um Smart and John Smart are sued as mem-
d partnership. They carried on business as
ts at Keewatin. The defendant Margaret
ent creditor of the defendant William Smart,
nt Humble is the sheriff of the district of

vidence adduced at the trial the following facts
e business carried on at Keewatin under the
. Smart was the business of the defendant
The defendant John Smart, who is an in-
partner in the business, but was the "J.
ame appeared in the firm name, under which
carried on. The defendant Margaret Green
ndant William Smart—her son-in-law—the
she holds a judgment, to enable him to start
a considerable part of the money advanced
by William Smart to the plaintiffs on the
supplied by them to W. & J. Smart, for the
they now seek to recover judgment.

with the plaintiffs and other wholesale mer-
Smart represented that his brother John was
e firm of W. & J. Smart. He obtained credit
representation. John Smart was cognizant
g held out by William as a partner in the
t his name was being put forward as that of
rtisements and otherwise. He acquiesced to
lding out, and he conducted himself in rela-
ess itself in many matters not as a mere em-
partner or joint proprietor. His infancy was
plaintiffs or to the other creditors of the busi-
is no evidence of any actual representation
le that he had attained his majority.

The business appears to have been badly managed and was soon in difficulties. Apprised, no doubt, of the state of affairs before other creditors, Mrs. Green obtained judgment for her advances against William Smart, to whom alone she had given credit. Under her execution the sheriff seized the assets of the business of W. & J. Smart and sold them for the sum of \$581.36. Margaret Green obtained an order attaching a debt of \$335 owing by Ford Beaton to "W. & J. Smart." This debt remained subject to this attachment.

While the proceeds of the sale under Mrs. Green's execution were still held by the sheriff, the present plaintiffs intervened as claimants. They brought an action against the sheriff to recover judgment for their claim, amounting to \$335, against William and John Smart as partners in the business of W. & J. Smart. In some manner, which I do not understand, interpleader proceedings were also instituted, and the Judge at Kenora directed the trial of an issue between the present plaintiffs and Margaret Green to determine whether or not the goods seized by the sheriff under Mrs. Green's execution and the Beaton debt "are partnership assets of the business of W. & J. Smart, and as such payable to the Codrington and Son Company in priority to said Margaret Green as a personal creditor of William Smart."

In this action the present plaintiffs were allowed judgment for their claim, and the sheriff was directed to pay the same to them, and to add Margaret Green and the sheriff as defendants to the action and to claim a declaration that the moneys realized by the sale of Margaret Green's execution and the Beaton debt are payable to the payment in full of the plaintiffs' claim against the partnership firm of W. & J. Smart in priority to the claim of Margaret Green under her judgment," and costs of the action in full.

An order was subsequently made for the trial of the plaintiffs' action and of the interpleader together, and the issues were embodied in the record before me.

The interpleader proceedings were, in my opinion, misconceived, and I shall deal with the record as if the interpleader issue were eliminated from it.

The plaintiffs are admittedly entitled to judgment for their claim against William Smart, and, if John Smart were not an infant, would have been entitled to judgment against him on the case of holding out which they made. The infancy of John Smart is a bar to a personal judgment against him.

ip, 7th ed., p. 87; Lovell v. Beauchamp,

findings that there was no partnership in fact and John Smart, and that the business of "W. & J. Smart" was the property of William Smart alone, as such a holding out of John Smart as a partner, had he been *sui juris*, have rendered him liable to the plaintiffs, it is contended for them that the assets of the business of "W. & J. Smart" should be available to the individual creditors of William Smart, in the same priority which they would have had, had there been a partnership of William Smart and John Smart in business as "W. & J. Smart."

In *Re Hayman*, 8 Ch. D. 11, the English Court of Appeal, under a bankruptcy adjudication, the assets of a partnership were held to be the assets of a similarly situated, and held that the assets of a partnership should be available to the joint estate of the actual owner and his personal creditors, and a personal creditor of the former was a claimant who had given credit to the partnership firm.

In *Re Crankshaw*, L. R. 1 Ch. 421, also a decision of the English Court of Appeal, is the authority upon which the court rests its judgment in *Ex p. Hayman*. The court has clearly and unmistakably enunciated that in relation to joint and separate assets to the payment of separate claims, the rights of creditors are not affected by the mere fact of an ostensible partnership as they are not affected by the mere fact of an ostensible partnership in fact.

In *Re Mowat*, 19 Gr. 113, Mowat, V.-C., held that in a partnership, as well as in bankruptcy, is, that his separate creditors rank first upon the separate estate of each partner, and his joint creditors rank first upon joint estate of the partnership.

In *Re Theisger*, L.J., at p. 25, said that but for the decision in *Re Rowland and Crankshaw*, L. R. 1 Ch. D. 231, he "should have made further argument as to the consequences arising from an ostensible partnership in the event of bankruptcy, both joint and separate creditors." The Lord said that he pointed out the inapplicability of any principle to the position of the separate creditor who is looking upon assets of his debtor employed in an ostensible partnership. He regards the assets of such assets are to be deemed joint property

as an offshoot of the doctrine of reputed ownership Justice James is of opinion that the doctrine of ownership was really the foundation of Lord Cranford's judgment in *In re Rowland and Crankshaw*.

In *Kelly v. Scott*, 49 N. Y. 595, the Court of Appeals of the State of New York laid down the same doctrine. In *Kleeck v. McCabe*, 87 Mich. 599, and in *Thayer v. Egan*, 91 Wisconsin 276, the like rule was applied.

While there is an obvious difference between the present case and those to which I have referred, in that the partners of the real proprietors in those cases became personally liable to creditors, whereas in the present case the law protects John Smart from personal liability, the preferential rights of the creditors of the ostensible firm do not depend not upon the joint liability of the ostensible partners, A. and B., but upon the fact that the property which the business of the ostensible partnership is charged with, though in law that of A. alone, will in equity be treated as the joint property of A. and B., with precisely the same incidents as if the partnership had been real and not ostensible. Had there been in the present case a real partnership between William Smart and John Smart, the fancy of the latter would have precluded the plaintiff from recovering a personal judgment against him, never mind the partnership property, including the interest of the infant partner, would have been exigible to satisfy the partnership debts: *Lovell v. Beauchamp*, [1894] A. C. 1. The fact that John Smart because of his minority escapes personal liability, does not affect the rights of persons who go to the ostensible partnership to resort for payment. The assets were the apparent assets of such ostensible partnerships in the same manner and to the same extent as if there had been a partnership in fact.

The hardship to which Mrs. Green is subjected by the application of this rule is manifest. But Lord Justice Baggallay said in *Ex p. Hayman*: "The hardship would be exactly the same if there had been a real partnership. The same consequences would then have happened where there is only an ostensible partnership."

The plaintiffs will, therefore, have judgment against William Smart, trading under the name of "W. & J. Smart," for the sum of \$988.63, with interest from 9th April, 1901, and costs of this action other than costs incurred upon or in connection with the interpleader proceedings.

to have judgment as against Margaret Green, they are entitled to payment in full of their (and costs) out of the proceeds of the sale of business of "W. & J. Smart" in the hands and out of any moneys which the sheriff may attaching order against Clifford Beaton, in favour of Margaret Green as an execution creditor.

The sheriff of this action, exclusive of costs of or by reason of the interpleader proceedings, shall be paid to him by the plaintiffs, who may sue against the defendant William Smart the costs of the sheriff.

It will have judgment against the defendant for payment of their costs of this action, whether incurred or occasioned by or by reason of the interpleader proceedings, and subject to a set-off of the costs of said action incurred in or by reason of such interpleader proceedings.

As against the defendant John Smart the action will be dismissed with costs.

SEPTEMBER 13TH, 1907.

WEEKLY COURT.

TODD v. PEARLSTEIN.

*Act—Breach of Injunction—Deliberate Act—
Arrest—Imprisonment—Costs.*

Plaintiff to commit defendant for breach of injunction contained in the judgment pronounced in the action of the 5th May, 1907, whereby in effect defendant was restrained from using the plaintiff's trade mark (commonly known as the union label) in connection with the sale of goods.

For plaintiff, J. J. Connor, for plaintiff.

For defendant, J. J. Connor, for defendant.

J.:—On 11th July defendant called at the residence of Thomas Murphy, tobacconist in Hamilton.

and endeavoured to sell to him certain boxes of cigars, but Mr. Murphy declined to purchase them, because they did not bear the union label. Thereupon the defendant withdrew, and shortly afterwards returned to Mr. Murphy's establishment with the union label stamp affixed to the boxes of cigars in question, and sold them so stamped to Murphy. This use of the union label was a clear infraction of the injunction.

The defendant by his affidavit admits selling the cigars in question; he says that Murphy insisted upon their bearing the union label; and that, having some of these labels in his possession, he attached them to the boxes. His contention is that the labels which he used were real union labels, not imitations, and that the injunction only enjoined him from using imitations, and he swears that he would not have done what is complained of if he had thought such action would be a breach of the injunction.

It is evident that this use by him of the union label was a deliberate act, and I am unable to discover in his affidavit any excuse for his conduct. Persons enjoined by an order of Court are bound to obey such injunction.

The defendant has been guilty of a deliberate breach of the injunction. He says he is a man of no means. Therefore a pecuniary fine in his case would be no punishment. The order of the Court, therefore, will be that he be committed to gaol for 24 hours, and until he purges his contempt by filing with the Court a suitable apology, and that he pay the costs of and incidental to this motion.

THE
ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, SEPTEMBER 26, 1907. No. 18

SEPTEMBER 16TH, 1907.

DIVISIONAL COURT.

HAMILTON v. HAMILTON, GRIMSBY, AND BEAMS-
VILLE ELECTRIC R. W. CO.

*Costs — Taxation — Counsel Fee — Trial or Assessment of
Damages — Interlocutory Judgment — Noting Pleadings
Closed — Items of Tariff.*

Appeal by defendants from order of FALCONBRIDGE, C.J., ante 197, dismissing defendants' appeal from certificate of senior taxing officer as to allowance of a counsel fee of \$125 as fee with brief at trial.

J. G. Gauld, Hamilton, for defendants, contended that there was no trial but only an assessment of damages, and that not more than \$10 could be allowed under item 152 of the tariff.

No one contra.

THE COURT (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), held that there having been no interlocutory judgment, but merely a noting of the pleadings as closed, the proceedings were not to be regarded as an assessment of damages.

MEREDITH, C.J., speaking for himself, expressed the opinion that the note to item 153 of the tariff applies to item 152 as well, and thus the counsel fee of \$10 on assessment of damages is liable to be increased.

Appeal dismissed without costs.

SEPTEMBER

DIVISIONAL COURT.

LOUDEN MANUFACTURING CO. v. M

*Infant—Purchase of Goods—Action for Price—
 Infancy — Alleged Ratification after Majority
 Acknowledging Account—Insufficiency—Claim
 of Goods in Hand after Majority — Amendm*

Appeal by plaintiffs from judgment of R
 9 O. W. R. 829, dismissing the action, which w
 for the price of goods sold. The appeal was agai
 ant William S. Milmine only. That defendant
 infancy at the time the goods were purchased.

R. L. McKinnon, Guelph, for plaintiffs, con
 ratification after majority, and also that they we
 to judgment for the value of the goods in the
 of defendant William S. Milmine at majority.

J. G. Farmer, Hamilton, for defendant Willi
 mine, contra.

THE COURT (MEREDITH, C. J., MACMAHON
 GEE, J.), agreed with the trial Judge that the l
 upon as ratification was not sufficient to satisfy t
 but held that plaintiffs were entitled to leave to
 setting up an alternative claim for the value of
 in the hands of defendant William S. Milmine a
 and were entitled to succeed upon that claim to
 of \$75. Leave to amend granted, and judgment to
 for plaintiffs without costs of action or appeal.

SEPTEMBER 1

DIVISIONAL COURT.

EUCLID AVENUE TRUST CO. v. HO

*Summary Judgment — Rule 603 — Mortgage —
 —Defence—Fraud—Leave to Defend.*

Appeal by defendants from order of RIDDE
 Chambers, reversing order of Master in Char

s to enter summary judgment under Rule
n by mortgagees to recover possession of
ises. The defendants were husband and
gaged premises were the property of the
by affidavit the defence that the mortgage
n her by plaintiffs as security for a debt of
means of statements made by officers of
e taking of the mortgage was a mere form-
uld not be liable upon it, and that the prop-
and would be sufficient to answer his debt.

ston, for defendants.

r plaintiffs.

(MEREDITH, C.J., MACMAHON, J., MA-
llowing the decision of the House of Lords
h's Distillery Co., 85 L. T. 262, that this
hich unconditional leave to defend should

ed and order of Master restored. Costs
o be costs in the cause.

SEPTEMBER 17TH, 1907.

C.A.

AVANAGH v. GLENDINNING.

ent — *Agent's Commission on Sale of Mining*
percentage Rate — *On what Amount Commission*
change in Form of Transaction — *Continuity*
n — *Substitution of Purchaser* — *Order of*
court Directing New Trial — *Appeal from, by*
- Increase in Amount Awarded to Plaintiffs
-appeal — *Judgment* — *Rule 817.*

endants from order of a Divisional Court
(1906), upon the appeal of plaintiffs, setting
ent of BOYD, C., at the trial, which was in
iffs, but only to the extent of \$1,500 and
ting a new trial, with liberty to plaintiffs
statement of claim by making an alternative

claim as upon a quantum meruit. The action was for recovery of commission on a sale of mining lands. The plaintiffs claimed a commission at the rate of 10 per cent. on the sale for \$250,000.

The appeal was heard by MOSS, C.J.O., GARFIELD, J., LAREN, MEREDITH, JJ.A., and RIDDELL, J.

E. F. B. Johnston, K.C., for defendants.

J. Shilton, for plaintiffs.

MOSS, C. J. O.:— . . . The employment of the plaintiff to find a purchaser was not questioned. The court found that there was an introduction to defendant by the instrumentality of plaintiffs, of a person named Hanson with whom defendants entered into an agreement for the purchase by him of the lands in question, the Cross Lake property, for the price or sum of \$30,000 upon certain terms as to payment set forth in the agreement, and this is not now disputed. But plaintiffs alleged that defendants agreed to pay them commission at the rate of 10 per cent. upon the amount of the purchase price. They contend that they earned and are entitled to 10 per cent. on that sum. Defendants, on the contrary, contend that the bargain was that they were to pay plaintiffs 5 per cent. commission on all moneys as and when received of Hanson of the purchase price; that plaintiffs procured Hanson on that basis; and that the sum of \$30,000 only was paid by defendants on account of the Hanson purchase, and Hanson made default and abandoned the transaction, and the property having been subsequently sold to others. The court was not agreed with this contention. He held that the only fact that he could find proved was that defendants were to pay 5 per cent. commission to be paid as the purchase price came in; and, as regarded the transaction with Hanson, there was a complete break in it after the receipt by Hanson of \$30,000, and a new bargain and sale of the lands with which Hanson had nothing to do, and in which, therefore, plaintiffs were not entitled to a commission. And on these grounds—substantially—he held that plaintiffs were entitled to 5 per cent. on the sum of \$30,000.

The Divisional Court, without determining the legal questions between the parties, were of opinion that it was ought, in the interests of justice, to be a new trial.

any express contract for a specified rate as proved, and thought that if it was the parties had not agreed upon the amount of proper way to determine it would be to as a usual rate in such transactions, which would probably govern, but, if there was no the inquiry should be what is a reasonable and they were of opinion that, as the evidence directed to that view of the case, it is satisfactory that the inquiry should be at a upon a reference.

expressed themselves as not at present satisfied as such a break in the transactions as discounts to commission upon the balance of money beyond the \$30,000.

ment of the appeal the principal questions whether there was an agreement as to what were the terms; and if there was an stated commission, upon what amount of was it payable? In addition it was complained that the Divisional Court having, in their discretion, directed a new trial, their judgment to be interfered with.

that branch of the case, I am of opinion that it should establish an agreement to pay a commission of 10 per cent.

and, I think the correspondence and testimony distinct offer by the defendants of a commission, and an acceptance by the plaintiffs of that rate of compensation. There is no evidence to show that perhaps through pressure to be from A. E. Osler, or from motives of friendship or other considerations, or in some other way, the defendants might be induced to increase the commission, but there was no promise or agreement which the plaintiffs were entitled to rely upon to obtain the employment, and proceeded to provide the basis of 5 per cent. I do not think, it is so satisfactorily shewn that the right to commission was conditioned upon the receipt of the purchase money, or that the plaintiffs were to be paid as and when the moneys were received of the purchase price. It is true that Glendinning states in his evidence that that

was the agreement, and reference was made to in his letter to Osler of 11th October, 1905, to that from any payment that might be made by or any person for whom he was acting, a commission per cent. would be allowed, the same to be paid on credit at the time the payment was made. But it was that the object of the stipulation as to placing the credit was to protect the right of his associates in the commission. At the time when that letter was written Glendinning was under the impression that Osler was tending to purchase for himself, or for himself and others, and Glendinning's idea was to provide for the plaintiffs getting their commission out of any moneys that might be paid directly by Osler or his associates in the purchase. But these terms of the letter do not apply with reference to the case of a person procured to deal directly with the defendants and to become a purchaser and make the payment for himself.

The defendant McLeod's information, however, led him to understand the nature of the arrangement with the plaintiffs to be that they were to procure a

The Chancellor found that Hanson came to the plaintiffs as a purchaser, through the instrumentalities of the plaintiffs. They dealt with him, made their contract with him, and, having done so, Glendinning wrote on October, 1905, to the plaintiff Cavanagh as follows: "I am pleased to be able to report to you that we have just made a deal with C. L. Hanson of Chicago for \$250,000, \$15,000 in cash, \$15,000 in 90 days, and balance of \$190,000. This is evidently a mistake in the sum, which was \$220,000. This is a good deal, and as soon as the bank is notified as to our title the bank is to be instructed to pay the money held in escrow. I have written to Frank for instructions re the commission you were to get. The same day he wrote Frank (Hutchins) informing him of the sale to Hanson, and saying, among other things, 'I will kindly send instructions as to what steps are to be taken to secure you the 5 per cent. commission on the offer.'" In the correspondence which followed, the bank does express the plaintiffs' willingness to accept the offer of the first payment and to wait for the remainder of the purchase money is paid. But this is based on the fact that he be allowed 10 per cent. instead of 5 per cent. On

deal in the evidence to warrant the conclusion that the commission was earned and became as a binding agreement for the purchase of the property entered into between the defendants and the plaintiffs. There was no agreement by the plaintiffs to share the commission on failing to pay, nor any warranty, express or implied, as to the solvency or financial ability of the defendants.

The defendants dealt with him and entered into the agreement with him in reliance upon their own knowledge. The defendants, without any reference to the plaintiffs, and without the plaintiffs' knowledge or consent, varied the terms of the agreement in ways that would have been to the disadvantage of the plaintiffs as regards times of payment. The plaintiffs were never consulted in connection with the property after the agreement was entered into. This line of conduct was inconsistent with the defendants' present contention that they were looking to Hanson's payments for the commission.

It may be that this be not the proper conclusion, it does not follow from the plaintiffs' claim. On a careful consideration of the facts I am unable to agree with the Chancellor's finding that such a break in the continuity of the transaction occurred as to break with the agreement with Hanson and the agreement with Ferguson, as to deprive the plaintiffs of their right to payment of commission on the money paid or payable under the latter agreement. Viewed in whatever light it may be, upon the facts as stated to me that the sale of, or rather agreement to sell, the property to Ferguson was nothing more than a consummation of the agreement for sale initiated by the agreement of 31st October, 1905. This was varied as to terms of payment by the agreement of 27th November, 1905, and both these were superseded by agreements of 15th January, 1906, whereby the terms were varied. By the terms of these latter agreements, the commission was made to enure to the benefit of and was payable to the personal representatives and assigns of the plaintiffs thereto. In all substantial respects these agreements corresponded with the earlier agreements, the only difference being as to the terms and times of payment. It is a difficulty in shewing a title, owing to the numerous cautions which it was necessary to register in regard to which actions were pending.

On the eve of the trials, the defendants accepted the offer made by Hanson that he would undertake to purchase the title of the claims in litigation if the plaintiffs would advance the purchase money by \$50,000. As put by Hanson in his testimony, they lowered the price from \$200,000 if Hanson would remove the caution, and might have had to pay more for it (p. 149).

The position was that he said, "Change the caution to \$200,000, and I will assume the risk of the claims" (p. 151). It ultimately turned out that Hanson had to effect a settlement on payment of \$30,000 and costs, thereby making a gain of \$18,000 on the deal with the defendants. But in order to procure the money Hanson had recourse to Mr. A. G. Browning, a resident of North Bay, from or through whom he obtained the sum of that sum upon the terms of an agreement bearing date 11th April, 1906. And as part of the agreement was executed contemporaneously therewith an assignment by Hanson to Browning of all the former's estate and interest in, to, and under the agreement with date 15th January, 1906, and the mining lease of the property issued to the defendants, and assigned or agreed to be assigned by them to Hanson (exhibits 22 and 23). The assignment to Browning was only by way of repayment of the advance of \$30,000, together with an additional sum of \$30,000 for the use of the \$30,000 on or before 26th May, 1906.

Now, it is not open to serious doubt that up to the time of the plaintiffs' rights in respect of commission remained unaffected. Hanson continued in the position of purchaser, entitled as against the defendants to the purchase of the agreement of 15th January, 1906, subject to paying the purchase money, except in so far as the defendants had seen fit, on a question of clearing the title to the extent of their claim under the agreement.

In what way did the subsequent dealings and transactions alter the situation so as to affect the plaintiffs' rights in them of their rights? As matters appear to me, what was done was a continuation of the original agreement of sale and purchase by persons whose claims arose from Hanson and were based on his rights.

On 24th April, 1906, the defendants assumed to enter into an agreement with Browning for a transfer of the mining lease of the property, for the consi-

able \$15,000 on or before midnight of 5th further payment of \$15,000 on or before mid-une, 1906, a further payment of \$10,000 on ght of 15th July, 1906, a further payment e before midnight of 15th October, 1906, and \$100,000 on or before 12 months from the eement, i.e., on or before 24th April, 1907. 0 was based on that sum being the amount on under the arrangement by which he pro- val of the cautions, and for which he paid cept as to the times for payment of the eement was a counterpart of the agreement , 1906.

sted that this agreement is one of the docu- ng of which in the appeal case is duplicated, (exhibit 21) the date is put as 20th April, er (exhibit 24) the date is 24th April. The o indicate that the latter is the correct date. g and the others concerned with him in greement do not deny that Hanson was en- nefit of it, and there seems to be no doubt e time it was made, he was not in default efendants under his agreement with them, under the agreement with him. He was, that his assignee and mortgagee, Browning, e agreement of 24th April, and, because the itor very properly required some authority gned the release of 24th April (exhibit 18). ed, or not disputed, that, notwithstanding he was, as between himself and Browning, the benefit of the agreement between the Browning.

at agreement, Browning, besides acting for ng on behalf of his associates, among whom and in equity the latter was assignee and anson and entitled to claim through him as It only remained for Hanson to pay Brown- title himself to call for an assignment of the th April, and to stand in the position of is associates with respect to the property. a May, 1906, before there was any actual e agreement of 24th April, a payment of to the defendants, and a receipt is given ledging receipt of \$10,000 paid to them by

John Ferguson "on account of purchase price of the property for assignment of mining leases" of the property. The balance of the purchase money is provided for by the agreement is to be paid on or before 8th May; and the remainder is to be paid in the amounts and on the days mentioned in the agreement of 24th April, except that 16th October is substituted instead of 15th, as in that agreement.

The payment was arranged for and probably made by Browning, who met the defendants for the purpose. Without doubt, his motive was to keep on foot the agreement, which the \$30,000 paid to remove the cautions was intended to continue to be treated as a payment by Hanson on account of the purchase moneys, the balance of the purchase money remaining at \$200,000.

It is unnecessary to discuss the effect upon the rights as between him and Browning and Ferguson of the stipulation in the document of 5th May as to the time of payment, Ferguson being subject to the right of Hanson to require him to make payment on or before midnight, and to refuse to refrain from doing so. But I fail to perceive what difference between the plaintiffs and the defendants, it should be made as terminating the sale to Hanson, initiated by the plaintiffs, and continued throughout as a dealing between Hanson or his assigns.

Having regard to the relations between Hanson and Ferguson, and the substitution of the latter for the former, and the fact that Hanson, who admittedly was entitled to Hanson's position, was a mere matter of form. And, so far as the plaintiffs are concerned, it produced no alteration in their position. The original sale is, in effect, being carried out, and, even if the defendants' own shewing as to the terms of payment is correct, the plaintiffs are entitled to be paid 5 per cent. commission when the purchase moneys are received.

The plaintiffs did not cross-appeal or ask for a new trial, being satisfied with the new trial awarded by the Court. But under Con. Rule 817 the Court has power to give any judgment that ought to have been pronounced, and may exercise it in favour of all or any of the parties. It is thought they may not have appealed.

The power thus given is wider than that possessed by the Divisional Court and Court of Appeal in England, and it is not the difficulty that was found in *Toulmin v. Toulmin*, 11 App. Cas. 746, more fully reported in 58 L. T. R.

any reason, judgment cannot be entered for above indicated, I think the new trial or Divisional Court should be affirmed in order of the parties may be properly adjusted.

the Court will be that the judgment of the t be set aside and judgment be entered for plaintiffs of a commission at the rate of n the sum of \$200,000 received, or to be pect of the sale of the property, in addition in respect of which the sum of \$1,500 has y the judgment at the trial.

ants to pay the plaintiffs the costs of the ourt. No costs of appeal to the Divisional

MACLAREN, JJ.A., concurred.

J.A., and RIDDELL, J., dissented, for reasons n writing.

SEPTEMBER 17TH, 1907.

C.A.

RUNK R. W. CO. v. CITY OF TORONTO.

CIFIC R. W. CO. v. CITY OF TORONTO.

*over Highway Crossing—Protection of Public
Railway Committee of Privy Council—Jurisdic-
— Injunction — Declaration — Existence of
harbour—Water Lots—Jus Publicum—Con-
tatutes, Patents, and Agreements—Municipal
— Diversion of Highway — Expropriation of
ensation—Navigable Waters—Order in Coun-
ing Order of Railway Committee—Time for
nt and Completion of Work—Variation of
ut Appeal.*

plaintiffs from judgment of ANGLIN, J., 6
 dismissing the actions.

The appeals were heard by Moss, C.J.O., Orow, and MacLaren, JJ.A.

W. Cassels, K.C., and W. A. H. Kerr, for p
Grand Trunk Railway Company.

E. D. Armour, K.C., and Angus MacMurchy
tiffs the Canadian Pacific Railway Company.

J. S. Fullerton, K.C., and A. H. Marsh, K.C.,
ants.

Moss, C.J.O.:—. . . The first and main
which plaintiffs claim to be entitled to the relief
is want of jurisdiction in the Railway Commi
Privy Council to order plaintiffs to construct an
over their respective lines of railway a bridge
from the south side of Front street southward
of Yonge street to the waters of Toronto Bay.
tention is based upon the proposition that Yon
not a street or highway upon or along or across
portion of plaintiffs' railways is constructed—t
it extends only to the north side of Esplanade st
any case no further south than the north side o
dian Pacific Railway Company's line of railway.

It is not disputed that, assuming the existence
tion in the premises, it was in general the prov
Railway Committee, under sec. 187 of the R
1888, to determine the question whether it was e
necessary for the public safety to require plaintiff
the street or crossing and to direct the nature o
and the steps to be taken by means of which such
should be afforded, and that in such case the ac
Committee is not open to review in the Courts
vince.

But it is contended that, as regards the ord
this instance, there are objections to its validity
title plaintiffs to relief in these actions, even
Railway Committee's general jurisdiction be
These objections will be noticed more fully later.

From the nature of the case as presented on
pleadings, it is manifest that upon them rests the
establishing the grounds on which they claim
relief.

Plaintiffs are here seeking a declaration that
is invalid and incapable of enforcement because

state of circumstances which does not afford the tribunal. They also, it is true, claim an right to the enforcement of the order, but, as the trial Judge, it is not alleged or shewn that they were threatening or intending to enforce it, and are entitled to any relief, it is to a decree only. Enough appears on the face of the evidence to exhibit prima facie jurisdiction in the matter, it is for the plaintiffs to displace, if they can, the position upon which the jurisdiction has been asserted. After all, is only another way of stating the position that plaintiffs must make out their

case, if at all, the question of the existence of a highway south of the north side of Esplanade was discussed before the Railway Committee. If there was a contest on conflicting facts, and the Committee decided them adversely to the plaintiffs. Plaintiffs can place their right to injunction based on findings of fact no higher than the finding of prohibition, and in such cases it is settled that the courts will not interfere where there has been no error of law which go to the question of jurisdiction. There is no reason to doubt that the Railway Committee, before it gave its decision, had ample information on which it reached the conclusion that Yonge street was a highway across which the lines of plaintiffs' respective railways were constructed, within the meaning of section 2 of the Railway Act, 1888.

Now, the expression "highway" in the Railway Act includes any public road, street, lane, or other way of communication: sec. 2 (g).

It was before and at the time when the order was made by the Railway Committee, the locus in question had a clear and outward visible appearance upon the ground, and was within the statutory description. It was being used daily for business and other purposes by very large numbers of pedestrians crossing and using the plaintiffs' lines of railway from and to the north side of the street to and from the waterfront, without objection on the part of the plaintiffs or any other person. To all intents and purposes it was a highway for communication in common public use for many years. In the words of the trial Judge, "the

right of the public to so cross has been notorious, and the railway company"—he is here referring to the Grand Trunk Railway Company—"has in no way recognized the existence of duties on its part in exercising that right such as it owes to travellers crossing highway." He goes on to say: "What is said of the Grand Trunk Railway upon the Esplanade is equally true of the Canadian Pacific Railway since the construction of the 'Don branch' south of the Grand Trunk Railway."

When to this open and continuous user and access by the public of access to the water front by means of a well-defined route in the line of Yonge street, as a public highway, and to the long-continued acquiescence of the plaintiffs, there is added the fact that, so far as a public right was only in the course of proceedings in this action, it was asserted, and then only on behalf of plaintiffs against the Canadian Pacific Railway Company, that there was any right of or title to the soil of the land on which their route situate when crossing the route in question, and that the municipality in which the soil is vested, by grant from the Crown, was acknowledging the public right and its application on that ground, what more was required to give the Committee jurisdiction?

There is, perhaps, another view upon which the jurisdiction of the Committee would attach, quite irrespective of the position of Yonge street as a highway crossed by the plaintiffs' tracks. Section 187 applies to the case of a public highway constructed upon or along a street or other public place at rail level. The Esplanade has been determined to be a public highway over its full width of 100 feet (200 feet 602), and portions of the Grand Trunk Railway Company's lines are constructed upon and along it. Is not this sufficient to give jurisdiction under the section? If so, does it not rest exclusively with the Committee to deal with the question of the public safety at the point where the Esplanade in the line of Yonge street, and to order and direct the measures to be taken in order to remove the danger arising from the position of the tracks, to the extent of traffic there? The public have an undoubted right to travel upon and over the Esplanade, to the full extent of its width, and in doing so at the point in question it is immaterial whether they are to be regarded as travelling on Esplanade street or on Yonge street: their

if, in order to give effect to proper measurement becomes necessary to carry the proposed line of the Esplanade and over the tracks of the Pacific Railway Company, is there any reason why jurisdiction should not extend so far?

It is necessary, however, to support the jurisdiction

The judge has made an independent examination of the evidence presented on the evidence adduced before him and come to the conclusion that no good reason exists against the existence of Yonge street as a thoroughfare by the lines of the respective railways—which I entirely concur.

It is not necessary to enter into an inquiry as to the origin of the street, or to trace the steps by which it came to its present site as a thoroughfare to the bay. It is admitted that prior to 1840 the street had become a highway from north of the limits of the bay east as far south as to the water's edge of

The Esplanade commences in 1837, when the Council dated 17th August authorized the grant of the lands of the city of Toronto of nearly all the then water and land covered by water on the water front from Berkeley street west to Simcoe street, for the construction of an Esplanade or street extending south of the water's edge, as shewn on the map. On this came a patent from the Crown to the city of Toronto on the 1st February, 1840, granting the lands and water referred to in the order in council. These instruments and an examination of the map to the patent renders it difficult to resist the conclusion that it was the intention both of the Crown and the city to preserve, by means of the public highways, the water's edge, free access by the citizens generally to the water front, wherever that front was to be; to the water's edge as long as the water continued; and to the southern edge of the water when that work was completed.

It was contemplated that on the water line there should be a network extending from the east to the west of the Esplanade, and that the whole space between it and the water margin of the bay was to be formed into dry land filled in with earth. And equally clearly it

was contemplated, as the plan indicates, that forming the extensions of the streets should continue down to the new water line. And through a mass of subsequent agreements and legislation there is a line or a syllable manifesting or indicating the design by the city authorities, or any one else, from that intention. On the contrary, many of the documents afford evidence of the consistent adherence of the authorities of the city to that view, and the full understanding and acquiescence in the same by the various parties concerned or interested in the construction of the projected work. When, after several abortive attempts to proceed with the construction, the Grand Trunk Railway Company undertook it under agreement with the city on the 30th August, 1856, one part of the work that the company agreed to perform was to "grade, level, and make the streets leading thereto and thereon," the reference being to the Esplanade, and Yonge street being one of the 16 streets. Can it be fairly doubted that the purpose of the agreement intended to express and did express a full understanding as to what was to be the position of the ground when the work was completed, i.e., 16 streets giving direct access across the Esplanade to the water front between the water lots lying in front of the Esplanade and tending to the Windmill line? In following up the history of the dealings with the various railway companies from the completion of the construction of the Esplanade to the filling in with earth of the space between it and the shore of the bay, the same solicitude for the public interest and access to the water front is shewn, and again and again a thorough understanding and interest of all parties to the effect is manifested.

It is unnecessary to go in detail through the various proceedings of the legislature and agreements. The trial jury has fully performed that task, and has demonstrated the same in regard to the Grand Trunk Railway Company and also in regard to the Canadian Pacific Railway Company. The city authorities have guarded the right to public ways and crossings over the various lines of railway, and the water front, and that Yonge street is included in such public ways.

The special contention of the Canadian Pacific Railway Company, founded upon their original occupation of the line of their railway along the south front of the Esplanade,

...n, been fully met and answered by the trial
 ...rk was performed in the exercise of the
 ...chises of the Ontario and Quebec Railway
 ...are much more restricted than those con-
 ...Canadian Pacific Railway Company by their
 ...Vict. ch. 1, which, as said by Gwynne, J.,
 ...ver v. Canadian Pacific R. W. Co., 23 S. C.
 ...anted to that company much greater powers
 ...an were given to the railway companies of
 ...al character constructed under the Railway
 ...d for that reason, as well as for the reason
 ...re entirely different, neither that case nor
 ...ase of Attorney-General for British Colum-
 ...Pacific R. W. Co., [1906] A. C. 204, has
 ...o the present case. -

...cation of the "Don branch" lines and their
 ...he site authorized by the order in council
 ...did not operate to vest in the Ontario and
 ...Company, or its lessees the Canadian Pacific
 ...y, the fee or any estate of freehold in the
 ...r land covered with water lying at the foot
 ...from Berkeley street to Bay street, inclu-
 ...the tracks were laid, nor was it intended
 ...it would have any further operation than
 ...of crossing a highway. Nothing more
 ...tes and emphasises this than the letters
 ...une, 1893, and the map which accompanies
 ...of it. The latter shews on its face that it
 ...or on behalf of the Canadian Pacific Railway
 ...akes reference to a letter from Mr. G. M.
 ...pany's solicitor, to the Hon. T. M. Daly,
 ...terior, dated 14th November, 1892. There
 ...randum or certificate of the clerk of the
 ...the effect that it was approved on the terms
 ...uncil of 23rd March, 1893, by the Governor
 ...order in council, which was put in evidence,
 ...tters patent, by the plaintiffs, makes refer-
 ...ation made by the Canadian Pacific Railway
 ...r date the 14th November last," obviously
 ...at date from Mr. Clark to the Hon. Mr.
 ...ne plan, and no doubt the letter set out in
 ...defence to which the trial Judge refers.
 ...by the plaintiffs that these documents were

not receivable as evidence. But they do not or contradict the terms of the letters patent, and the fact that the order in council, which in substance the statements of the letter, was put in the hands of the plaintiffs, they may well be looked at, on an inquiry into the facts of the case, as to the circumstances existing when the order in question took place.

In truth the statement in the order in council is that "the company further points out that the grant of the easement will not interfere with the Crown grant to the City of Toronto or to any other party a full and complete use of said parcels of land, subject only to the use for the purposes above mentioned," no more than summing up the situation which had been agreed upon and provided for in the "Windmill Agreement" entered into on the 1st of December, 1888, and to which the Canadian Pacific Railway and the City of Toronto were parties, by their solicitor, Mr. Clark, the witness, in a letter of 14th November, 1892.

The Canadian Pacific Railway Company never intended in respect of these parcels a higher or greater use than a railway obtains in respect of the crossing of the street in the course of its construction. And in regard to the plaintiffs not only does the evidence adduced at the trial not displace the conclusion which the Railway Committee must have formed with regard to the use of Yonge street as a street or public highway and not as a railway, but the railways are constructed, but it is strongly urged that thereof. I agree with the trial Judge that "the use of the prolongation of Yonge street as a public highway for communication in the nature of a street running parallel to the front of the works constructed for the Don branch of the railway, the tracks of the Canadian Pacific Railway and the Grand Trunk Railway Company, as well as the Grand Trunk Railway Company, is abundantly established both in fact and in law."

The Railway Committee, therefore, had jurisdiction to entertain and deal with the defendants' application. Having jurisdiction it was for it and not for the ordinary tribunals to determine how and by what means the danger complained of was to be remedied or avoided. The committee said that the order operates harshly on the plaintiffs and that with that we have nothing to do. Of that the committee was the sole judge.

But it is contended that, assuming that the committee was possessed of general jurisdiction

er made was ultra vires and without jurisdiction assumed to direct the construction of a "diversion" of Yonge street from the street at present connects Front and Esplanade. Because it directs the appropriation by the City for the purposes of the so-called diversion, of the land now the property of the plaintiffs the Railway Company. The point was made that the Committee authorizes a bridge or a diversion, and not a diversion as much learned argument as to whether it should be treated as disjunctive or should be treated as "and" and so make the powers and remedies of the Committee for the purposes of this case, it is not to be taken on the language of the section. Read together with sec. 188, and in its light, it appears to be in the power of the Committee with power to direct or order any work rendered necessary by or properly carrying out of the main design determined by the Committee that is rendered necessary by the Committee should be within the power of the Committee to be done. It is only necessary to ascertain the power of the Railway Committee was, and to see that it was ordered in consequence of that decision of their power and authorities under sec. 187. That the immediate construction of a bridge over the tracks was necessary for the protection of the public, and that upon the completion of the raising of the railway tracks at rail level was necessary and dangerous. The Committee decided that a bridge should be constructed, on the west or east side of Yonge street, at the expense of the defendants, so as to give a straight crossing over the tracks, and that, upon completion of the raising of the street, where it crossed the railway on the east side, it should be closed.

That as the bridge must start at the south side of the street and as the width of the masonry for the bridge would occupy the greater part of the width of Yonge street southerly to and across the street to the tracks, and as it was necessary that the crossing between Front street and the tracks should be clear for traffic, it was essential to widen the street for that purpose.

The direction as finally made with regard to the widening, and of which the plaintiffs complain, was in view to overcoming the inconveniences caused by the location of the said bridge on the westerly side of Yonge street. It is ordered that the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company shall appropriate or otherwise acquire a strip of property 44 feet in width on the east side of Yonge street, extending southerly from Front street to Esplanade street, in accordance upon the said plan, and that such strip of property shall be used as a diversion of Yonge street and as and for the purpose of and to form part of Yonge street. The said expropriation shall be made and Yonge street widened before the commencement of the erection of the bridge, or so soon thereafter as may be reasonably possible, and the cost of such expropriation, widening, and the expenses occasioned thereby shall be borne by the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company in equal shares."

While these directions may appear to operate to some degree of hardship upon the plaintiffs, yet, as the matter is within the jurisdiction of the Committee to give effect to, it is not to be reviewed and declared void on that ground.

Now, the name given to that which is directed to be done with regard to Yonge street is of no consequence. Whether it is a diversion or a widening, both of which terms are used in the order, or a deviation, as it was termed in the original petition, the essence is the same—it is a work necessary for the convenience of the traffic which would otherwise be caused by the construction of the bridge. And it can be said with confidence of a doubt that, when the carrying of a municipal highway by means of a bridge over the tracks of a railway is required, carrying it over another municipal highway lying between the tracks and running parallel to the railways' tracks, is incidental to the power under sec. 187 to order the railway company to power to preserve or provide proper access to a parallel highway from and to the highway from the bridge springs. Matters of this nature must be the subject of consideration on every application brought at present, and it is to be assumed that in every case the committee would endeavour to avoid creating any greater inconvenience or causing any more inconvenience than the work necessarily called for.

that the direction involves the acquisition of some of the lands to be used for the purposes now the property of the Grand Trunk Railways does not appear to oust the jurisdiction of the section 187 clearly contemplates the taking needed for the proper carrying out of the resolution of the Committee. And when all or some of the lands already the property of one of the railways are taken by the order, the matter is reduced to a question of adjustment between them. It has not been shown by the actions that the present use made by the Grand Trunk Railway Company of the lands in question is so important or even difficult its devotion to the purposes of the Committee, even if that could properly be the subject of inquiry except before the Committee.

It is contended on behalf of the plaintiffs that, even if the order could have been validly made by the Railway Company, it is void because of the want of the sanction of the Governor-General in council. It is argued that the order was not validly given in accordance with the provisions of the Railway Act, 1888, and that in any event the Governor-General could not alter or vary the terms of the order by changing the dates specified in the order or the time for the commencement and completion of the work. The order was rendered void.

Questions may be dealt with upon the assumption that the effect of the Statute 4 Edw. VII. ch. 32, sec. 1, is to give the legislation as regards the powers, authorities, and jurisdiction of the Governor in council in the same manner and condition as if the Railway Act of 1903 had

been as required to be done or might be done by the Governor in council with respect to the order made by the Committee under date of 14th January, 1904? The question is quite plain, upon the language of sec. 187, that the order is required in order to give vitality or operation to the decision of the Committee that it is expedient for the public safety to require a railway company to do certain acts or perform certain works. No preliminary inquiries and the report of the committee are made by the Railway Committee, but the order does not go for naught unless the sanction of the Governor in council is given. In effect it is nothing more than a report or recommendation submitted for the

consideration of the Governor in council, and is there finally dealt with. Is there legally or constitutionally anything to prevent the Governor in council from adopting the recommendation in whole or with such alterations as upon discussion in council appear proper to be made? The expression "Governor in council" in this section has no unusual meaning. When it says "with the sanction of the Governor in council" it means the Cabinet or Privy Council acting in the ordinary constitutional way. It is not a case of conferring a special power, but a case of the council exercising its ordinary functions.

It is well known, of course, that the practice in the Dominion of Canada for a number of years has been in accordance with constitutional usage that the business in council is done in the absence of the Governor-General. The mode in which business is done is by report to the Governor-General of the recommendations of the council sent to the Governor-General for his consideration, discussed when necessary between the Governor-General and the Premier, and made operative by being marked "approved" by the Governor-General. See Todd's Parliamentary Government under Colonial Institutions, pp. 37, 38. The matter is first brought before the council in the form of a memorandum or report by a responsible Minister of the Crown, generally containing his recommendations. But the council need not accept or adopt the memorandum or report on the recommendations as made. It is for it to take such action as seems appropriate. And in this must be involved the right and the power to make such changes in a report or recommendation of the Railway Committee, when submitted, as may be recommended by the Minister submitting the same, or as may be decided upon after discussion in council. The final conclusion of the council approved by the Governor-General is the sanction of the Governor in council required by sec. 187.

In this particular instance the order passed by the Railway Committee on 14th January, 1904, was brought before the council by the Minister of Railways and Canals, who was the chairman of the Committee, with a recommendation that it be sanctioned except as to the dates for commencement and completion, which he recommended should be 15th October, 1904, and 15th April, 1905, respectively, instead of the dates mentioned in the tentative order of 14th January, 1904. The council adopted the recommenda-

tion and submitted it for approval, and it was approved by the Governor on 7th October, 1904. It appears to me that no reasonable exception can be taken to this procedure or the order which is the outcome of it. In any case I should have thought that in the matter of dates which were not in any respect of the essence of the order, their alteration by the Governor in council could have had no possible effect upon its validity.

In this view, it does not seem to me that there was any necessity for the subsequent proceedings taken while the cases were before the trial Judge.

It was argued that, inasmuch as the dates fixed by the Railway Committee had expired before this action of the Governor-General in council, the order was effete and could not be revived. But the answer is that it was not an operative order at all until sanctioned. The whole order was tentative, and the dates were not binding on any of the parties. The power to deal with it and alter or vary it in any particular resided with the Governor in council until it was finally sanctioned. After that, if it became necessary to extend the time fixed for the completion of the work, the power to do so, upon proper cause shewn, is given to the Railway Committee under sec. 189.

It may, perhaps, be proper to refer to an objection taken, that the order provides no proper place for the terminus of the bridge at its southern end, the locus at present being partly water in the slip between the wharves to the east and west of the present termination of Yonge street at the water front. One answer to this is that in point of fact the part now covered by water really forms part of Lake street under the Windmill agreement, and that all that is needed to secure a landing for the bridge is the extension of Lake street to the east in accordance with the terms of the agreement, and, no doubt, defendants will gladly do whatever may be their share of that work. But the question of the terminus of the bridge was for the Committee alone. There being jurisdiction to deal with the subject of a bridge, it is not for the Courts to enter into the question whether the work determined upon has been directed to be done in the most reasonable manner or in the way best adapted to carry into effect the end intended to be accomplished.

The appeals should be dismissed.

I may add that if the trial Judge had acted upon the conclusion he appears to have formed that the only relief

plaintiffs could seek was a declaratory judgment. The cases were not proper ones for granting a decree, and he should not have been prepared to disagree with the Master, as he deemed it proper, influenced by the important questions involved and the apparent anxiety of the parties to obtain a decision upon them, to deal with the matter, and has done so in the most careful, painstaking and thorough manner in every branch and detail, it seems to be undesirable to dispose of the case otherwise than by a consideration of the merits.

OSLER and GARROW, JJ.A., each gave reasons for the same conclusion.

MACLAREN, J.A., also concurred.

CARTWRIGHT, MASTER.

SEPTEMBER

CHAMBERS.

BERRY v. HALL.

HALL v. BERRY.

Consolidation of Actions—Cross-actions—Possession—Specific Performance of Contract—Burden of Proof—Stay of one Action—Judicature Act, sec. 57,

Motion by Berry, plaintiff in the first action, to stay the second, for an order under the Judicature Act, sec. 57, sub-sec. 12. staying the second action, and the claim of the plaintiff therein to be set up in the first action, etc.

H. D. Gamble, for Berry.

S. H. Pritchard, for Hall.

THE MASTER:—By the writ of summons in the first action the plaintiff therein asks for possession of the town of Haileybury. It was issued on 16th September. The statement of claim was delivered on 3rd September. It states that plaintiff is owner of the lot in question.

defendants offered to buy the same for were not to have possession until payment; paid a deposit of \$375, and some time in fully took possession, but refuse to give up the balance of the purchase money.

action was begun on 28th May, claiming value of an alleged agreement made on 3rd for sale of the lot in question. The plaintiff at the same time delivered a statement of claim, and the defendant a statement of defence and counterclaim, the day on which the statement was delivered in his action.

The defendant then delivered a statement of defence and counterclaim in the first action, repeating the allegations in the statement of claim in the second action, whereupon Berry replied to and joined issue.

The case might be tried by a jury, but the second sitting of the jury at North Bay are fixed for 9th December. But by the Statute Act, sec. 90, and Rule 538 (e), the plaintiff must be ready for trial at that time, and the parties are anxious for a speedy hearing.

The court decided that an order should go staying one of the two actions. The only question was which should be stayed. The court was of some difficulty. The whole question is considered in Thomson v. South Eastern R. W. Co.,

It will be sufficient to refer to that case and to the remarks of Brett, L.J. From these it is clear that the question of which is the earlier action is to be decided unless there is nothing else to guide the court. The principle decidendi is concisely stated by Holker, L.J. "In such a matter as this I cannot be content to leave it to the party to be reasonable that the party to whom the burden has substantially everything to prove in it, should fail substantially unless the necessary evidence is produced. should be allowed to commence the action, to have the trial and to have the control of the case as he was adopting the ground on which the case was put by Brett, L.J.

On this principle to the present case, it would seem that the second action is the one which should be

allowed to proceed, as the whole burden of proof is on Hall. Although the statement of defence in the first action commences with a denial of the plaintiff's title, it continues, it admits his title, and states an agreement between the plaintiff and Berry for the sale of the land. There is no allegation of an agreement between the plaintiff and Berry, and Berry relies on this as a defence, under the Statute of Frauds, to the second action. It is, therefore, incumbent on Hall to give such evidence as will entitle him to judgment requiring plaintiff to complete the sale, and if this cannot be adduced, the plaintiff must succeed. The real dispute seems to be as to certain alterations and improvements which Hall alleges Berry was to make, and which Berry repudiates; but Hall must prove his right to possession and to have a conveyance if Berry fails to carry out the sale.

The case of *Holmes v. Harvey*, 25 W. R. 100, is said to have proceeded on the ground that actions for specific performance were at that time assigned to the Chancery Division, so that the judgment has no application to the present case.

The order will be to stay the first action, and the whole question be tried in the other, which shall be expedited by both parties that it can be set down for the October sittings. The costs of this motion will be in the cause, and those of the first action will abide the result of the second action.

SEPTEMBER

DIVISIONAL COURT.

KIRTON v. BRITISH AMERICA ASSURANCE

Fire Insurance — Insured Buildings Destroyed by Fire — Railway — Compromise of Owner's Claim against Insurance Company — Bona Fide Settlement — Claimant's Insurance Company — Subrogation.

Appeal by plaintiff from judgment of MABEY, J., at trial at St. Thomas, dismissing an action to recover upon an insurance policy against fire. Plaintiff was the owner of the Pere Marquette Railway, and his

by the fault of the railway company. The
ed for the purposes of this action at \$1,250,
ed by defendants for \$550. Plaintiff had
from the railway company, but not in full of
was held at the trial that plaintiff could not
benefit of the railway company.

, K.C., for plaintiff, contended that the right
arises only where the insurer pays the total

ble, for defendants, contra.

MEREDITH, C.J., MACMAHON, J., MAGEE, J.),
as competent for plaintiff, acting bona fide,
his claim against the railway company for
the total loss by the burning of his build-
that they were liable to him. Also, that a
\$1,000, in the circumstances of the case, was
le, and a settlement for that amount could
be otherwise than a bona fide one. If plain-
g to treat his claim against the railway com-
ting to \$1,000 and to be debited with that
uld be judgment in his favour for \$250 with
costs of appeal to either party. If plaintiff
g to do that, there must be further investiga-
circumstances of the transaction between the
ny and the plaintiff; the evidence upon this
en at the next sittings at St. Thomas. Plain-
ne to elect.

SEPTEMBER 19TH, 1907.

DIVISIONAL COURT.

MILLS v. SMALL.

*Contract—Provisions of—Construction—Architect—
ion—Extra Work—Payment for, outside Con-
ease in Cost—Knowledge and Acquiescence of
each of Covenant—Damages—Cross-action—
ecution.*

defendant from judgment of RIDDELL, J., 9
in favour of plaintiffs in an action to recover

moneys due for work done for defendant upon a Hamilton under a contract with the Fuller Clay Building Company of New York. The aggregate of the work was not to exceed \$22,500. Ultimately the cost was \$34,000. Riddell, J., allowed the Fuller Co. \$450 and \$500 for extra services, the plaintiff \$600, the Roeser & Sumner Co. \$218.50, and plaintiff \$15.28.

J. L. Counsell, Hamilton, for defendant, contended that some of these sums should not have been allowed.

H. H. Bicknell, Hamilton, for plaintiffs, contended that

THE COURT (MEREDITH, C.J., MACMAHON, J.), dismissed the appeal with costs, without prejudice to any action which may be brought by plaintiffs for damages for breach of alleged covenant that building should be completed for \$22,500. Execution in this case for claim of company of \$950 to be stayed for 6 months to enable defendant to set off his claim.

THE
D WEEKLY REPORTER

TORONTO, OCTOBER 3, 1907. No. 19

SEPTEMBER 23RD, 1907.

C.A.

VAN LAND AND HOMESTEAD CO. v.
LEADLAY.

*Transfers of Land—Releases—Company—Im-
purity—Fraud and Collusion—Redemption—Ac-
counts—Time for Redemption—Withdrawal of
Mortgage—Postponement of Mortgage—Agent
Sale of Lands—Compensation—Costs.*

Plaintiffs from judgment of TEETZEL, J., dis-
missed.

Case heard by MOSS, C.J.O., OSLER, GARROW,
REDITH, JJ.A.

For plaintiffs, Kingston, and J. J. MacLennan, for

for K. C., and W. H. Blake, K.C., for defend-
ants.

K.C., and A. J. Russell Snow, for defendants

...:—One purpose of the action was to impeach
a deed of 6th July, 1893, executed according to the
provisions of the Territories Real Property Act (Dom.),
by the seal, and by the hand of the defendant
their managing director, in favour of one Ed-
ward (now deceased) and one Thomas Hook, em-
ployed by the company.
L. no. 19—35+

bracing certain lands owned by the plaintiffs Assiniboia, and Saskatchewan, for securing pay mortgagees of the sum of \$100,000 on 1st May interest at the rate of $6\frac{1}{4}$ per cent. per annum advance half-yearly, on the first days of November with a proviso that the interest should be 6 per cent. within 15 days after the same matured. The plaintiffs alleged that the power to borrow moneys was 75 per cent. of the paid up capital stock, and that of the mortgage the paid up capital stock amounted to more than \$90,970, and they claimed that the mortgage should be declared void in so far as it exceeded 75 per cent. of that sum, and to that extent be a security upon the lands comprised within it.

Another purpose was to void and set aside a transfer dated 31st May, 1900, executed under the seal and by the hands of John J. Withrow, the plaintiff and the defendant John T. Moore, their manager, whereby the plaintiffs transferred to the defendant Isabel Leadlay and Percy Leadlay, as executrix and executor of the last will and testament of Edward A. Leadlay, the plaintiffs' interest in the lands situate in Assiniboia comprised within the above mentioned mortgage, or so much of them as remained undisposed of, and also two transfers of transfer dated 10th May, 1900, executed under the plaintiffs' seal and the hands of the said president and director, whereby the plaintiffs transferred to the defendants all the plaintiffs' interest in the lands in Assiniboia and Saskatchewan (respectively) comprised within the mortgage, or so much thereof as remained undisposed of.

The plaintiffs alleged that the execution of the transfers was induced and procured through fraud and collusion between the defendants Leadlay and John T. Moore, and that they were given without the plaintiffs' authority and without consideration to the plaintiffs.

Another purpose of the action was to declare void against the plaintiffs, certain agreements entered into between the defendants the Leadlays and John T. Moore assigned to and held by the defendant Annie A. Leadlay, relating to the disposal of the lands comprised within the instruments of transfer, or to declare the last

s for the plaintiffs of their interest under
ents.

s claimed to be entitled to the relief men-
e let in to redeem the lands, on the footing
e standing as a security for the reduced
e defendants the Leadlays accounting for
and for their dealings with the mortgaged

ts united in upholding the validity and pro-
eached instruments and dealings and affirm-
th and honesty of purpose of all parties en-
sted therein. They set forth in detail the
eading to and connected with the various
arged the plaintiffs with knowledge, delay,
e, and denied their right to any part of the

it was established beyond dispute that the
f \$100,000 secured by the mortgage was ad-
mortgagees, and that it had been employed in
ts or liabilities of the plaintiffs properly pay-
hat, subsequently, the mortgagees agreed to
nt of their mortgage claim to the floating
plaintiffs, and that as part of the transaction
ads were transferred in May, 1900, the mort-
ilities or debts of the plaintiffs amounting
000 and \$40,000.

nce was given and received with regard to
by the defendant John T. Moore with the
erties, as bearing on his alleged fraudulent
gh counsel for the plaintiffs conceded that
recover in this action in respect of such mat-
that, so far as the defendant Moore was con-
y sought in this action was to shew that he
the benefit of the agreements and transac-
aim and the Leadlays (p. 143). And at the
he evidence it was agreed with respect to one
at the defendant John T. Moore and other
ed to allow shareholders to exchange their
s, that the evidence adduced should be con-
ken from the record.

progress of the trial there were some pro-
ounter-propositions as to terms on which the
t be let in to redeem the mortgage, notwith-

standing the releases of the equity of redemption to inability to settle the footing on which the indebtedness should be ascertained and payment came to nothing.

In the result the trial Judge upheld the releases and denied the plaintiffs' claim to be deemed. He found the charges of fraud to be disproved with regard to the agreements between the defendants Leadlays and John T. Moore, he held that at the time the lands had become vested in and the absolute property of the defendants the Leadlays, and the defendant John T. Moore were entitled into any bargain or agreement relating thereto as he saw fit to do, and that the defendant John T. Moore occupied no fiduciary or other position towards the plaintiffs which prevented him from agreeing for his own benefit that he was not a trustee for or accountable to the plaintiffs for his dealings with the lands under the agreement. He dismissed the action as against all the defendants.

The plaintiffs appealed, relying on substantial grounds as at the trial.

At the opening of the appeal, and again at the close and definitely in the course of his argument, the plaintiff's counsel, on the plaintiffs' behalf, expressed the view that the agreement to redeem the defendants the Leadlays, treating the mortgage as a valid security for the whole amount including the amount advanced and paid by the plaintiffs in 1900, under and upon what has been called a redemption agreement, and the agreement under which the mortgaged lands were released to the Leadlays, making proper allowances for taxes and other expenditures, and payments and expenses incurred in and about the lands which have been disposed of. The plaintiff withdrew all charges of fraud against the defendants Leadlays.

Mr. S. H. Blake, on behalf of the defendants, submitted to redemption on these terms, but the plaintiffs should not be allowed the usual 6 months' extension, but should pay the sum found to be payable on a shorter date. Having regard to all the circumstances, it will not be unfair to either party to permit the redemption for redemption, provided that the effect will not be to take it out of the power of the parties to deal with

od. It would probably not be to the advantage of the party to tie up the lands at a time when it is not possible to make sales. No doubt, however, and with regard to this can be arrived at between

between the plaintiffs and the defendants the result seems to be no reason why judgment should be rendered to the effect indicated.

ent of the matter as between the principal and the defendants it is unnecessary to deal at length with the evidence by the plaintiffs in support of their appeal against the defendants the Leadlays. It is sufficient to say that the evidence fully warrants the plaintiffs in now withdrawing the charges of fraud or want of good faith from the mortgage. The evidence displaces any idea of improper conduct on the part of those concerned or taking part in the mortgage to Leadlay and Hook, or the mortgage being the mortgage, enabling disposal of the mortgage to be made by the plaintiffs, and post-poning the mortgage to the floating liabilities, or of the mortgage to the equity of redemption to the mortgages. It is established that whatever different views may be entertained in the light of subsequent events as to the business prudence of the step, the coming to release the equity of redemption to the defendants under an arrangement whereby the other plaintiffs were paid off and the plaintiffs' expenses, was well justified by the then facts and circumstances. But it is not now necessary to discuss the facts or the legal aspects. It only remains to consider the position of the defendants the Moores in virtue of the mortgage with the Leadlays of which they are the defendants. There is no difficulty created by reason of the defendants the Moores having assigned the benefit of the mortgage to his wife and son, or because the former are assignees. The right under the agreements is the same whether or better position in consequence of the assignment. The case can be dealt with as if the defendants the Moores, with whom the agreements were made, were the only one of the Moores named in them, and the only one interested.

that John T. Moore occupied towards the mortgage the ground for the argument that he could

standing the releases of the equity of redemption to inability to settle the footing on which the indebtedness should be ascertained and payment came to nothing.

In the result the trial Judge upheld the releases and denied the plaintiffs' claim to be deemed. He found the charges of fraud to be disproved with regard to the agreements between the defendants Leadlays and John T. Moore, he held that at the time the lands had become vested in the absolute property of the defendants the Leadlays, and the defendant John T. Moore were entitled to enter into any bargain or agreement relating thereto as they saw fit to do, and that the defendant John T. Moore occupied no fiduciary or other position towards the plaintiffs which prevented him from agreeing for his own benefit that he was not a trustee for or accountable to the plaintiffs for his dealings with the lands under the agreement. He dismissed the action as against all the defendants.

The plaintiffs appealed, relying on substantial grounds as at the trial.

At the opening of the appeal, and again more fully and definitely in the course of his argument, the plaintiff's counsel, on the plaintiffs' behalf, expressed the view that the agreement to redeem the defendants the Leadlays, treating the mortgage as a valid security for the whole amount including the amount advanced and paid by the plaintiffs in 1900, under and upon what has been called a redemption agreement, and the agreement under which the mortgaged lands were released to the Leadlays, made no allowance for taxes and other expenditures, payments and expenses incurred in and about the lands which have been disposed of. The plaintiff's counsel withdrew all charges of fraud against the defendants the Leadlays.

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od. It would probably not be to the advantage of the party to tie up the lands at a time when it is not possible to make sales. No doubt, however, an arrangement with regard to this can be arrived at between

between the plaintiffs and the defendants the result seems to be no reason why judgment should be given to the effect indicated.

As to the matter as between the principal and the defendants it is unnecessary to deal at length with the evidence by the plaintiffs in support of their appeal against the Leadlays. It is sufficient to say that the evidence fully warrants the plaintiffs in now withdrawing the charges of fraud or want of good faith from the defendants. The evidence displaces any idea of improper conduct on the part of those concerned or taking part in the mortgage to Leadlay and Hook, or the giving of the mortgage, enabling disposal of the lands to be made by the plaintiffs, and postponing the mortgage to the floating liabilities, or of the inequity of redemption to the mortgages. It is established that whatever different views may be entertained in the light of subsequent events as to the business prudence of the step, the course taken to release the equity of redemption to the plaintiffs under an arrangement whereby the other mortgages were paid off and the plaintiffs' expenses, was well justified by the then facts and circumstances. But it is not now necessary to discuss the facts or the legal aspects. It only remains to consider the position of the defendants the Moores in virtue of the mortgage to the Leadlays of which they are the mortgagees. There is no difficulty created by reason of the death of John T. Moore having assigned the benefit of the mortgage to his wife and son, or because the former was not an assignee. The right under the agreements was not altered or better position in consequence of the death of John T. Moore. The case can be dealt with as if the defendant John T. Moore, with whom the agreements were made, was the only one of the Moores named in them, and was the only one interested.

It is not that John T. Moore occupied towards the ground for the argument that he could

only enter into an agreement for the acquisition of any part of the lands of which the equity of redemption had been released, for the benefit of the plaintiffs. Assuming that the release of the equity of redemption was in law and in fact a valid transaction, and, therefore, binding upon the plaintiffs, it cannot be denied that if afterwards they could have brought about an arrangement by which in certain events they would receive back a portion of the lands, there is nothing in law to prevent them from doing so; and if the position that John T. Moore occupied towards the plaintiffs was such that if he obtained an arrangement of that nature with the Leadlays, it was his duty, as well as his legal obligation, to give the benefit of it to the plaintiffs, then it would follow that he could not in this action set it up on his own account and for his own benefit. It must not be forgotten that the effect of the release was not to work a dissolution of the plaintiffs' corporation. The defendant John T. Moore was not thereby discharged from his position as managing director. Indeed, he afterwards assumed to do acts on behalf of the plaintiffs as managing director; and there is force in the argument that, in the circumstances of this case, he could not make an arrangement for the acquisition of a portion of the released lands on payment to the mortgagees of their claim under the mortgage, except for the plaintiffs' benefit; and that would be a sufficient ground to prevent him from setting up the agreements as a bar to redemption by the plaintiffs. But, quite apart from these questions, and without absolutely determining them, there is nothing in the nature of the agreements to enable Moore to set them up as a bar.

There can be no question that before the agreement of 13th February, 1902, John T. Moore's position and that of the other Moores was only that of agency for the care and sale of the lands, on certain terms as to compensation. By the agreement of 13th February, 1902, the position of agency was retained, but under certain circumstances the agent was to receive a transfer of all the Leadlays' interest in such of the lands as remained after the Leadlays had received, in the manner specified, the amounts which they were willing to accept in satisfaction of their interest in the lands. But in the meantime and until that was done in accordance with the terms of the agreement, Moore's position was still that of agent. Upon failure to perform the terms mentioned in

the agreement according to its provisions, the parties reverted to the terms of the agreement of 3rd November, 1900, with one immaterial variation.

Manifestly, the mode of compensation provided for in the agreement of 13th February, 1902, was dependent upon the Leadlays continuing to hold their position of control over the lands when Moore was, if he ever should be, entitled to call upon them to award it to him. But, through the intervention of the Court in a proceeding to which the Moores are parties, the Leadlays' position has been changed and their control over the lands rendered subject to redemption by the plaintiffs. There can be no question of collusion between the plaintiffs and the Leadlays with regard to the redemption of the lands. The judgment to that effect issues as the result of a compromise of contested rights fairly entered into after a prolonged litigation. The agreement does not vest an estate in the lands, or give Moore any claim to any part of them, except on a contingency which cannot arise if the plaintiffs redeem according to the terms of the judgment. Under the circumstances they hold no rights which they can, on either legal or equitable grounds, set up against the plaintiffs' claim to be allowed to redeem the mortgaged premises.

Proper compensation for services in and about the care and sale of the lands they will no doubt receive, but that will form the subject of allowances to be made to them through the Leadlays on taking the accounts.

The result is that the judgment appealed from is set aside, and, the plaintiffs withdrawing all charges of fraud against the defendants the Leadlays, and submitting to redeem them in respect of their mortgage, treating it as a valid security for the whole amount, and allowing the Leadlays to charge against the mortgaged lands the amounts advanced and paid by them under and upon the postponement agreement, and for the release of the equity of redemption of the mortgaged premises, making all proper allowances for taxes and other expenditures, including payments and expenses made or incurred in and about the care and sales of lands which have been disposed of or are undisposed of, the defendants the Leadlays accounting for the lands included in the mortgage, there will be judgment accordingly with the usual directions. There is no reason why the Leadlays, the mortgagees, should not receive their costs of the action, of

the appeal, and subsequent proceedings, more in view of the charges of fraud which have failed; to be added to their claim. In default of redemption to be dismissed with costs, including the costs of the appeal and subsequent proceedings.

As to the defendants the Moores, the appeal was allowed, but I think that as between them and the Crown there should be no costs of the action or appeal.

Upon the one hand, the plaintiffs made charges against these defendants of personal fraud, which were sustained, while, on the other, these defendants did not put themselves to a defence on the charges, but pleaded claims which they were not entitled to, and a considerable portion of the trial was taken up with matters not relevant to the real issues.

MEREDITH, J.A., gave reasons in writing for his conclusions.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

SEPTEMBER 2, 1891.

C.A.

REX v. ARMSTRONG.

Criminal Law—Carnal Knowledge of Girl under 16—Motion for Leave to Appeal—Proof of Guilt—Applicant's Wife—Testimony of Girl—Knowledge of Oath—Instruction for Purposes of Trial—Criminal Code, sec. 1003—Corroboration.

Application by John Armstrong, the defendant, to appeal from his conviction and for an order directing the police magistrate for the town of Napanee to appear for the opinion of the Court.

The motion was heard by MOSS, C.J.O., OSLER, J.A., MACLAREN, and MEREDITH, JJ.A.

W. G. Wilson, Napanee, and F. M. Field, Crown's counsel, for the defendant.

J. R. Cartwright, K.C., for the Crown.

:—The applicant was convicted on the c. 301 of the Criminal Code, of carnally under the age of 14 years, not being his wife, and to imprisonment in the penitentiary for a magistrate refusing the request of counsel for a stated case.

in which the counsel desired the case are: sufficiently proved that the girl was not the (2) whether the girl appeared sufficiently the nature of an oath to justify the magistrate testimony under oath; and (3) whether, should only have been received under sec. Criminal Code, it was sufficiently corroborated at section.

on was, with the consent of Mr. Cartwright created as the argument upon a case stated of the Court upon the points mentioned.

argument we disposed of the first question applicant, holding that upon the whole evi-ly appeared that the girl was not his wife.

second question, no good reason appears for the magistrate was wrong in determining's evidence under oath. He states that have with the wish of counsel for the appli- the girl regarding her knowledge of the na- he finds that she does not understand it.

in what was stated as being the answers questions addressed to her by the magis- for the applicant to indicate that she was understanding or did not understand. Though he is far from lacking intelligence, as her

It appears that she has been attending handwriting of her signature to the deposi- he is not an inapt pupil in that branch.

she had been instructed on the subject a the trial affords no sufficient ground for testimony was not to be admitted under

the Judges do not appear to have held pre- views with regard to the extent or means of ed in such cases, it seems quite settled that in the matter, may be instructed for the al.

Whether the girl in this instance was comp was a question for the magistrate, to be deter she was brought forward to testify. And, be as to that, he could not reject her testimony u

This conclusion disposes of the third que could only arise in the event of the second qu answered favourably to the applicant's contenti

The conviction must be affirmed.

MEREDITH, J.A., gave reasons in writing f conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., con

SEPTEMBER

C.A.

HAMILTON STEAMBOAT CO. v. Mc

*Appeal to Supreme Court of Canada—Extendi
Appealing—Leave to Appeal—Necessity for
Court of Appeal.*

Motion by plaintiffs for leave to appeal and t time for appealing to the Supreme Court of Can judgment of the Court of Appeal, ante 295, in f defendants.

The motion was heard by MOSS, C.J.O., OS MAACLAREN, and MEREDITH, JJ.A.

G. F. Shepley, K.C., for plaintiffs.

J. Dickson, Hamilton, for defendants.

OSLER, J.A.:—Under all the circumstances, may act upon sec. 71 of the Supreme Court Act, I ch. 139, and extend the time for allowing an appeal, i.e., approve of and allow the security pr given: *Vaughan v. Richardson*, 17 S. C. R. 703. have been done by a Judge of this Court, but procuring it to be done during the proper ti

ouncing of the judgment complained of (section 10) to have arisen from the impression—proven one—that leave to appeal was necessary, was sitting during that time to which the appeal could have been made. Inasmuch as we are of opinion that if we are of opinion that the case is fit for appeal, if necessary, should be granted leave of the Supreme Court Act, we should also grant leave quantum, and so save the parties from the costs of a possible motion before the Supreme Court for want of such leave. The respondents should, of course, undertake to expedite the costs of this motion should be costs in the respondents.

D., GARROW and MACLAREN, JJ.A., concurred.

J.A., was of opinion, for reasons stated in the time for appealing should, on terms, be granted that no order should now be made giving leave

SEPTEMBER 24TH, 1907.

CHAMBERS.

DRINKWALTER AND KERR.

n of Mortgagee's Costs of Sale Proceedings—Jurisdiction of Local Registrar.

the assignee for the benefit of the creditors of the mortgagor, from the taxation by the Local Registrar of a mortgagee's costs of sale property. The only point argued was whether that officer had jurisdiction to tax the bill in question.

Master, for the appellant.

Local Registrar, Cobourg, for the mortgagee.

—An appointment to tax was issued on 26th September 1907 by the officer styling himself "local registrar."

trar and taxing officer of the High Court of Justice at Cobourg." Upon the opening of the matter, objection was taken by the solicitor appearing for the assignee for the benefit of creditors of the mortgagor that the local registrar at Cobourg had no jurisdiction to proceed with the taxation. This objection was overruled, and the taxation was proceeded with under protest. Again, at the conclusion of the taxation, formal objections were filed, the first of which was a renewal of the objection to jurisdiction, which was disposed of by the officer as follows: "I hold that under R. S. O. ch. 121, sec. 30, I have jurisdiction to tax the said costs, it apparently being optional at the instance of any party interested to have such taxation before the local Master or the taxing officer."

The section of the statute referred to is as follows: "The mortgagee's costs may, without an order, be taxed by one of the taxing officers of the Supreme Court of Judicature or by the local Master, at the instance of any party interested."

Section 131 of the Judicature Act gives authority for the appointment of two or more taxing officers for the Supreme Court of Judicature, and these are the officials referred to in the above sec. 30 of ch. 121. Under Rule 84 the local registrar is made a local taxing officer, but, of course, this is a taxing officer of the High Court of Justice, and not a taxing officer of the Supreme Court of Judicature, and it is one of the taxing officers of the Supreme Court of Judicature that is given the authority to tax under sec. 30, and not a taxing officer of the High Court of Justice. Of course the local Master at Cobourg had jurisdiction under the section, but the local registrar is not the local Master there. Rule 85 cannot assist, as there was no action pending in the office of the local taxing officer.

It seems to me there is no way of getting over the objection to jurisdiction. There was no waiver of it, and the facts shew that the appellant proceeded with the taxation subject to his initial objection, and was always insisting upon it.

In the bill is a charge for obtaining an order from the County Court Judge for taxation under R. S. O. ch. 174, sec. 36. This order was not filed with the papers before me, and the taxation shews that the costs of obtaining the order were disallowed, the officer's reason being given as follows: "I disallowed all charges relating to the obtaining from the County Judge of an order for taxation, deeming it unneces-

sary, in view of the jurisdiction conferred upon me directly by the statute R. S. O. ch. 121, sec. 30."

The question of the authority of the County Court Judge to make an order under sec. 36 of ch. 174 was not argued before me, and counsel for the respondent did not attempt to uphold the taxation by virtue of the order.

I do not deal with the merits of the objections to the items of the bill in question.

In my view it is clear that the local registrar had no jurisdiction to tax the bill, and the appeal must be allowed. I can find no good reason for withholding costs to the appellant.

Appeal allowed with costs.

MABEE, J.

SEPTEMBER 25TH, 1907.

TRIAL

DOMINION EXPRESS CO. v. TOWN OF NIAGARA.

Assessment and Taxes — Express Company — Liability to "Business Assessment"—4 Edw. VII. ch. 23, sec. 10—Construction—"Occupied or Used Mainly for the Purpose of its Business"—Wharf and Premises of Steamboat Company.

Action for a declaration that the business assessments attempted to be made against plaintiffs for 1905 and 1906 were illegal and void, and for an injunction restraining defendants from levying or otherwise seeking to collect the taxes claimed by them in respect of such business assessments.

Shirley Denison, for plaintiffs.

A. G. Kingstone, St. Catharines, for defendants.

MABEE, J.:— . . . An assessment was on foot prior to 1905 between plaintiffs and the Niagara Navigation Co. whereby the agent of the latter at Niagara acted during the navigation season as the agent of the plaintiffs, each paying one-half his salary from May to November. During the remaining months of the year he was paid by the navigation

company. His clerk was paid in the same except that he was not in the employ of the navigation company when the boats were not running. Goods by express were received at Niagara by the agent of the plaintiffs, who used part of the office of the navigation company. The great bulk of these goods consisted of fruit in transit from Niagara to Toronto. Bills were issued; the express charges were divided between the two companies upon the basis of various scales upon the destination of the shipments. A large number of trucks were used. These were the property of the navigation company. When not in use they stood upon a portion of the navigation company's wharf that was found to be the most convenient. The navigation company handled all kinds of freight, passengers and the mails. The bulk of the freight was carried during August and September; some small shipments were carried in July and possibly the latter part of June and the first of October. There is no part of the premises that the navigation company have the exclusive right to; they pay for the use of the wharf or buildings. During the summer months the bulk of the goods are carried by the express company, but as to earnings of the two companies, if profits are included, that of the navigation company greatly exceeds that of the express company for the whole season. The wharf and premises are assessed for the navigation company, and . . . are used indiscriminately by both companies for the purposes of their business. The navigation company in all its branches exceeds the express company, taking as a whole, that is, from the opening to the closing of the season.

The question involved in this action is, whether the navigation company are liable to assessment for business tax under the Act of 4 Edw. VII. ch. 23, sec. 10. Under the provisions of that enactment, an express company carrying on business in connection with steamboats and occupying or using land is assessed for a sum to be called "business assessment," "such land is occupied or used mainly for the purposes of the business."

Plaintiffs were assessed under this head at \$10,000 in 1905 and 1906. It is clear that plaintiffs occupy a large portion of the town of Niagara; but is that land so occu-

for the purpose of their business? I think the evidence that the use of this wharf and the season is mainly for the purpose of the navigation company, and not for the business company. The words "occupied or used mainly for its business," in sub-sec. (c) of sec. 10, apply to express companies carrying on business in conveyances, steamboats, or sailing vessels, and not to the wharf mentioned in the earlier part of the submission. It seems to me that before the municipality can tax the company under the head of "business assessment," it must show that the main use to which the land is put is for the purpose of the business of the express company. In my view, this has not been done, and

the submission is to be read strictly, and it must be clear that the municipality to tax arises: In re Micklethwait; Tennant v. Smith, [1892] A. C. 150.

The submission was given to the effect that in any event the assessment was excessive; I ruled at the trial that the rate should not be raised in this action, but was for the assessment. . . .

plaintiffs as prayed with costs of action.

SEPTEMBER 26TH, 1907.

DIVISIONAL COURT.

BICKELL v. WOODLEY.

Trespass—Boundary—User—Evidence—Costs.

Defendant from judgment of BOYD, C., ante 7.

London, K.C., for defendant.

London, K.C., for plaintiff.

FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.
Appeal with costs.

SEPTEMBER

C.A.

LA ROSE MINING CO. v. TEMISKAMING
NORTHERN ONTARIO RAILWAY COMPANY

*Mines and Minerals—Crown Grant of Mining
Right—Reservation of Railway Right of Way—
Description—Plan—Actual Exception—
Land and not mere Easement—Title—Decision*

Appeal by plaintiffs from judgment of MA
W. R. 513.

G. H. Watson, K.C., and J. B. Holden, for plaintiffs

D. E. Thomson, K.C., for defendants the
mission.

G. F. Shepley, K.C., and T. A. Beament, O
fendants the Right of Way Mining Co.

A. W. Fraser, K.C., for the individual defendants

THE COURT (MOSS, C.J.O., MACLAREN, J.A.
J.A.). dismissed the appeal with costs.

BOYD, C.

SEPTEMBER

TRIAL.

WARREN v. D. W. KARN CO.

*Injunction—Business Morals—Publication of
in Garbled Form—Injury to Plaintiffs*

Action to restrain defendants from publishing
letters or testimonials in a garbled form, in the
stated in the judgment.

BOYD, C.:—The case for relief presented by
be thus stated. Plaintiff has been trained in
organ-building, and by special attention has ac
skill in the construction of pipe-organs for chu
qualified as an expert, he was employed by d
superintendent of their manufactory for about 1

d during that time a large number of pipe
essfully constructed under his supervision.
e of approved excellence, and plaintiff as-
tit of the work was chiefly due to his skill.
to two organs, testimonials were given in
f the plaintiff was recognized. The first in
n with the Metropolitan Church organ, was
an, a distinguished musician and organist.
, given in the shape of a letter from a well-
Mr. Jeffers, with reference to an organ in
odist Church, Toronto, in 1905, addressed
in he was congratulated on having "solved
thoroughly satisfactory electro-pneumatic
plaintiff became connected with defendants
ufacture the church pipe-organ. He left
the purpose of setting up an independent
e of church organs, and defendants, after
to make such organs. So that now the
ndants are rival makers and dealers, at
usiness competition.

aintiff's grievance is that defendants have
containing these two recommendations, but
ply solely and only to defendants. As to
t, this is done by omitting the words "and
arren," so that the sentence reads, "I am
ave every reason to congratulate themselves
nd as to Mr. Jeffers's letter, by striking out
"My dear Mr. Warren," and substituting
Co.,— Gentlemen."

s that he received the testimonials as
ndent of defendants, and that the possession
the documents is with defendants.

be content if defendants use and print
n their original unmutilated shape. But
he right to use such parts as they please
uch as serves their own purpose. To print
framed by the writers, would carry com-
panies, and they are now rival dealers—
be "business."

the testimonials (in whatever shape they
em to the plaintiff or the company, intend-
be published. And as between the super-

intendent and the company, whose agent or employee the testimonials were properly in the possession of the company, who had the right to control their publication, and the right continued after the plaintiff separated from the company, in the absence of any restriction imposed on the writers of the testimonials: *Howard v. Gunn*, 30

The whole complaint is that by the omission of certain words, plaintiff has been deprived of the reputation which is contained in the original testimonials. The thing of credit is withheld from him which would have been given him had no change been made in the testimonials incorporated in defendants' pamphlet published in connection with their present business. There is no proof that the plaintiff has been, or is likely to be, injuriously affected in his business by this alteration, or that the public has been misled astray thereby.

Granted that the testimonials have been garbled, and that in holding the parts relating to the plaintiff, does the court have jurisdiction to interfere by way of injunction to restrain the user of the papers? It is not every breach of trust or violation of good faith or departure from honour which can call forth the powers of equity to make good. There must be disclosed some case of civil wrong. The Court is bound to protect before the Court the publication of private papers: see *Lee v. Weir*, 2 Swanst. 402, 413.

Many doubtful, and, it may be, unwarranted arguments are left to the verdict of conscience or to the judgment of public opinion, and the present grievance appears to be outside of legal limits and to be reached in the domain of conscience. Tested by the business maxim "every man for himself," the pamphlet may be regarded as a shrewd piece of advertising; tested by the golden rule of fair dealing, it does not, in my opinion, fare so well. The testimonials are for the joint work of defendants and their guiding and then superintendent. To use them so as to exclude the plaintiff appears to be an unfair use. They had spent the money for advertising purposes when the business connection between the parties was severed, and thereafter they should have been withheld from public circulation, or they should have been printed as they were written. The case is not a good impression. I find no ground of legal liability, and the case should therefore be dismissed, but I do not give

SEPTEMBER 17TH, 1907.

C. A.

IDEAU CLUB v. CITY OF OTTAWA.

d Taxes — Social Club — “Business Tax” —
4 Edw. VII. ch. 23, sec. 10 (c).

plaintiffs from judgment of MABEE, J., 8 O.W.
 L. R. 275, dismissing an action for a declara-
 business assessment imposed upon plaintiffs, a
 the city of Ottawa, was illegal and void.

was heard by MOSS, C.J.O., OSLER, GARROW,
 and MEREDITH, J.J. A.

wis, Ottawa, for plaintiffs.

, Ottawa, for defendants.

. J.A.:—The appellants were taxed under sec.
 assessment Act, which provides for the assessment
 on occupying or owning land . . . for the pur-
 business mentioned or described,” in the section;
 of which said to be applicable to them being
 e words: “Every person carrying on the business
 ub in which meals or spirituous or fermented
 ld or furnished” The key-note of the
 therefore, the word “business,” and the real
 whether the appellants carry on the business of

“business,” being but a compound of the word
 he suffix “ness,” has a very wide import, being,
 speaking, applicable to anything about which
 anything may be busied; and so it was quite
 that one of its synonyms is “affairs;” and this
 es be brought home to us when making an un-
 mark, even though the subject of it may be so
 e fashion in or becomingness of wearing apparel.
 on observation that “it is none of your business,”
 d better attend to your own affairs.”

of the common uses is to convey the meaning of
 occupation carried on for the purpose of profit;
 e in a commercial sense.

It is quite obvious that the word could not have in its widest sense in this enactment; and perhaps that it was used in its commercial sense, the sense it is in business matters more commonly employed. It is in business matters more commonly employed in very many businesses mentioned in the section of businesses of that character, and that is very marked in the section in question; and the income from the business sub-sec. 7 exempt from taxation, by reason of the tax.

The appellants carry on no such business; shareholders; there are, and can be, no profits. It is not taxable, so too would be some whist clubs, musical clubs, Dorcas societies, mothers' meetings, cricket clubs, political clubs, and a thousand and one other persons engaged in no such business, and perhaps others engaged in business-like, in any sense, connected with the business which were plainly never intended to be thus taxed. They may provide both meat and drink, but not for any sense.

The mere renting of part of their own lands does not give colour to an accusation of carrying on business in the meaning of the enactment. It would be extraordinary if every landlord carries on such a business; and if landlords do, all must.

The cases throw a good deal of light upon some of them being much in point, in the appellants' case, and all that I have seen, without exception, tending to the same conclusion. See *State v. Boston Club*, 45 La. Ann. 585; *Smith v. Boston Club*, 15 Ch. D. 258; *In re Bristol Athenæum*, 43 Ch. D. 691, 695; *Portman v. Hospital Assn.*, 27 Ch. D. 81 n.; *Holmes v. Conn.* 117; *Goddard v. Chaffee*, 2 Allen 395; *L. Hardware Co., v. Perry Stove Mfg. Co.*, 86 Tex. 161; *dem. Wetherell v. Bird*, 2 A. & E. 161; and *Moss v. State*, 59 Ala. 34, 36.

I would allow the appeal.

OSLER and MACLAREN, JJ.A., gave reasons in support of the same conclusion.

MOSS, C.J.O., and GARROW, J.A., also concurred.

THE

WEEKLY REPORTER

TORONTO, OCTOBER 10, 1907.

No. 20

SEPTEMBER 30TH, 1907.

DIVISIONAL COURT.

CREAM AND BUTTER CO. v. CROWN
BANK OF CANADA.

*s—Action Brought by Liquidator in Name
in Liquidation—Liability for Costs—Assets
Undertaking of Liquidator.*

plaintiffs from order of MABEE, J., 9 O. W. R.
order of Master in Chambers, 9 O. W. R. 543,
plaintiffs to give security for costs, by means
of their liquidator.

on, for plaintiffs.

L.C., for defendants.

MULOCK, C.J., ANGLIN, J., CLUTE, J.), dis-
with costs.

SEPTEMBER 30TH, 1907.

DIVISIONAL COURT.

RE BOYD v. SERGEANT.

*—Jurisdiction—Division Courts Act, sec.
Brought in Wrong Court as against Gar-
adonment at Trial of Claim against Gar-
ction to Jurisdiction by Primary Debtor—
iving Act, sec. 16—Common Law Cause of
ision of Division Court Judge—Right to*

endant from order of RIDDELL, J., ante 377,
ion for prohibition to the 1st Division Court

Algoma.

no. 20—36

J. A. Paterson, K.C., for defendant.

W. E. Middleton, for plaintiff.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.),
dismissed the appeal with costs.

CARTWRIGHT, MASTER.

OCTOBER 1ST, 1907.

CHAMBERS.

COATES v. THE KING.

*Pleading — Amendment — Petition of Right—Consent of
Crown—Rules of Court.*

Motion by the suppliants for leave to amend the petition of right so as to read in the 14th paragraph that the suppliants "at the request of the said Government purchased" the second issue of treasury bills. The facts are stated in a former report, ante 462.

Featherston Aylesworth, for the suppliants.

N. Ferrars Davidson, for the Crown.

THE MASTER:—The motion was supported by Rule 929, which, it was argued, empowered the Court to deal with a petition of right in regard to the proposed amendment as if it was an ordinary action.

Rule 929 is substantially the same as sec. 7 of the Imperial Act 23 & 24 Vict. ch. 34. In Clode on Petition of Right, p. 176, this section is discussed, and it is shewn that "the Crown has always had a certain prerogative in matters of pleading and procedure which has not been taken away by this statute."

The cases of *Thomas v. The Queen*, L. R. 10 Q. B. 44, and *Tomline v. The Queen*, 1 Ex. D. 252, shew that as respects discovery the rights of a suppliant are not co-extensive with those of the Crown.

In the latter case Bramwell, L.J., points out that this is also the case as to security for costs.

No case was cited on the point of amendment, nor have I found any, except that of *Smylie v. The Queen*, 27 A. R. 172, where an amendment was granted by the Court of Appeal quantum valeat. No mention of this is made in the judgment of the trial Judge in 31 O. R. 202, and I have not been able to see a copy of the appeal book. But counsel for the Crown in that case may not have objected to the amendment, which only asked alternative relief by way of damages in case the suppliants were held to be entitled to the relief prayed for, and the Crown was unwilling to renew the licenses in the old form. It was not sought in that case to vary the statement of what is *prima facie* a material fact, as is asked here. The present motion is opposed except on terms which the suppliants decline to accept. I am, therefore, of opinion that it cannot be granted for two reasons.

(1) A petition of right has to be verified by affidavit. It would therefore seem to follow that as a condition precedent to entertaining the motion the proposed amendment should be verified in the same way, and the mistake satisfactorily accounted for.

(2) But, however that may be, it seems to be a more serious and indeed a fatal objection that any such amendment should be first submitted to the Lieutenant-Governor and approved of by him. The granting of the necessary fiat is an act of grace (*Clode*, p. 165, and cases cited.) Without this no further proceedings can be taken. If, therefore, a different case is sought to be set up, it is surely necessary that the permission of the Crown to proceed thereon should be granted.

This would sufficiently appear from the consent of the counsel for the Crown, which in such a case should be recited in the order.

For these reasons I am of opinion that the Rules as to amendments are not applicable to the present motion, as the Court has no power to amend a petition of right without the consent of the Crown.

The question is one of some novelty and importance, and the costs may be in the cause. . . .

CARTWRIGHT, MASTER.

OCTOBER

CHAMBERS.

WELBURN v. SIMS.

*Security for Costs—Slander—Chastity of Plaintiff—
1897 ch. 68, sec. 5, sub-sec. 3—Defence—*

Motion by defendant for security for costs brought under R. S. O. 1897 ch. 68, sec. 5, the motion made under sub-sec. 3 of sec. 5.

W. D. McPherson, for defendant.

W. N. Ferguson, for plaintiff.

THE MASTER:—Paragraph 4 of the statement of charges charges defendant with having made defamatory charges impugning the plaintiff's chastity to certain persons. It proceeds as follows: "And to the plaintiff's husband the defendant said 'If you knew what I know, you would not live with that woman (meaning the plaintiff) for 10 minutes,'" and adding particulars.

The defendant's affidavit in support of the motion sets out the previous alleged slanders and continues: "On one occasion, in response to a question from the husband of the plaintiff, tell him 'If you would not live with that woman for 10 minutes, you would not live with that woman for 10 minutes but denying any other statement to Mr. Welburn which might otherwise affect the plaintiff."

It is objected that no defence is shewn to the motion on the serious of the alleged slanders. There is confession of avoidance.

I agree with this view: and, following Palan v. R. 17 P. R. 553, I think the motion must be granted as to costs to plaintiff in any event. This renders it unnecessary to consider whether the plaintiff is responsible for the close of the argument I was under the impression that this had not been successfully attacked, within the time laid down by the Chancellor in Bready v. R. 7.

The defendant should plead in 10 days.

OCTOBER 1ST, 1907.

TRIAL.

N v. PACKARD ELECTRIC CO.

*Servant—Injury to Servant—Infant Employed
Negligence of Foreman — Dangerous Ma-
chinery—Liability of Employ-
ment—Workmen's Compensation Act—*

Damages for injuries sustained by plaintiff
employment of defendants, by reason of the
defendants, as alleged.

r, K.C., for plaintiff.

r, K.C., and G. B. Burson, St. Catharines,

The plaintiff entered the defendants' employ-
ment on 19th June met with an accident while
removing a tin plate out of a stamping machine.
He lost the middle of three fingers. He was between 14 and 15
years of age and had no knowledge of machinery of any kind,
but was employed by Mr. Pope, the defendants' foreman upon
his own promise, to help any one there who needed help,
and was doing piece work. He was not told how to operate any of the machines; the
defendants were not intended that he was to operate any,
and no warning as to any of them being danger-
ous. He was just turned loose upon this
with instructions to help any one and every one
(Mr. Pope), with no word of caution or warning of
any kind. On 19th June he was helping George Hill
operate the stamping machine in question;
he was brought to the machine by the plaintiff and Hill;
they were to operate the press; then, after they were
the plaintiff was to carry them away. Hill had left
a few minutes, and Pope called out and asked
whereupon the plaintiff, in the absence of
the press and endeavoured to get a plate
came down upon his hand. It is tripped

by a foot press, and this the plaintiff must have touched, as it appears it had never been known out pressure upon that part. Hill had been use a stick to take the plates out, but this had b

The accident plainly occurred by reason of endeavour to get the plates put through witho his attempting to remove one from a machine he had never been instructed nor warned as to

Pope had authority to employ the plaintiff, ing under such authority. Was he negligent in ing the plaintiff as to the danger of the machine mitted that the machine in question is danger foreman said there was no way to guard it. V duty of the foreman to point out to the plainti ous machines, and caution him, or give some i to how he should approach them, and, if it was he should not attempt to operate any of them from so doing?

I have no hesitation in holding his omission reasonable and sensible course to be the grossest negligence. The dangers surrounding the work th at were apparent to the foreman. They were appreciated by this inexperienced boy, and I a that the plain duty of any foreman, under th stances, is to point out, to caution, and to warn to do so is negligence.

The evidence does not disclose that the fore examination of the boy's capacity for apprec and so he was allowed to commence without a taken to ascertain his ability to perform the being set at. It is clear that the instructions help those requiring his assistance, would sooner him to assist some one in working a dangerous as in the result he was called upon to help H directed to perform what may be hazardous which he had had no experience; and, as I u liability and duty of masters under such circu that they are bound to point out the dangers o that work, thus enabling the infant employee t and avoid them; and omission so to do is ca makes the employer liable for the consequenc

contended that the defendants were not liable and had been guilty of negligence in omitting to rely upon the recent case of Cribb v. Ky. [1907] 2 K. B. 548, where it was held that the negligence on employment applied, and that, although it was an employer to give instructions to a foreman, a person employed by him in danger of injury was one that could be delegated to a foreman. The negligence of the foreman was a risk which even though an infant, takes upon himself. The case states that the action was based solely on a law liability, and so I presume there was no fault on the part of the plaintiff was not able to invoke the Employers' Liability Act.

The plaintiff is entitled to rely upon the provisions of the Act, sec. 3, which provides for personal liability of any person in the service of the employer who has any superintendence "intrusted to him in exercising such superintendence, and in such cases the defence of common employment is swept away. The foreman Pope was in the service of the defendant, was intrusted with the superintendence of the work on this floor, and while he was so exercising superintendence he was guilty of an omission of duty to the plaintiff, which I think was plainly negligent. I read the Cribb case as in any way cutting down the provisions of the Employers' Liability Act, but I do not regard it as assisting in the case here based upon the provisions of our Compensation for Injuries Act.

The plaintiff's case can also be based upon sub-sec. 4 of the Act, and, if desired, the pleadings may be so amended that the plaintiff was bound to conform to the directions of the defendant at the time of the injury he was so contributing to. The injury resulted from the negligence of the defendant. I think it was negligence in the defendant in directing the plaintiff to assist at the working of the machine, without himself giving some instruction or seeing that the operator of the machine

that the plaintiff has any redress under the Factories Act, as it does not appear that

the machine in itself could have been rendered safe by any sort of guard or protection.

I think the plaintiff is entitled to recover, the damages at \$600.

Judgment for plaintiff for \$600 damages and costs.

MABEE, J.

OCTOBER 1887.

TRIAL.

SERVOS v. STEWART.

Water and Watercourses — Lands Bordering Lake—Rights of Riparian Owner—Removal of Gravel from Shore—Trespass—Injunction—

Action for trespass to land.

J. H. Ingersoll, St. Catharines, for plaintiff.

G. F. Peterson, St. Catharines, for defendant.

MABEE, J.:—Plaintiffs own lot 5 in the 1st and broken front of the township of Grantham. The description in the Crown grant, which issued on 8th March 1871, covering lot 5, runs as follows: "Beginning on the shore of Lake Ontario where a post has been planted at the angle of lot No. 5, marked $\frac{B}{5}$, thence south to the place of beginning." A plan made by Mr. George Peterson in 1871, from a survey made by him, shews that the water line had receded between 7 and 8 feet. It was stated at the trial that since 1871 between 3 and 4 feet more have washed away. Plaintiffs' farm is cut off from the edge of the bank; this is a clay loam ran up to 15 feet in height, at the foot of which lies the beach composed of sand and gravel of varying width, in some places 10 feet, and in others the margin of shore or beach is 20 feet. I find upon the evidence of plaintiff Alexander Stewart and of George Coppen, that this shore or beach forms a barrier to the bank, and at the points where the shore is the highest, the bank is less liable to wash or cave in by high water and storms than where the shore is low.

his protection, over 40 acres of the land covered by the grant have washed away during the past century without the shore or beach, and with the effect of the waves upon the clay banks, a great deal of gravel would have been lost during that time. A narrow road led down to the beach, and in December last, and of this year, defendant drove down the highway to get gravel from the shore opposite the lands of the plaintiffs. Objection was taken to this by one of the plaintiffs, and defendant off. Again on 29th May defendant, with a number of his neighbours, and drew 18 loads of gravel from a point some distance from the road touches the beach, and opposite plaintiffs. Plaintiffs then had defendant notified in writing that he drew two loads after receiving the written notice. In his examination for discovery says he intends to draw as soon as his farm work will permit him. So defendant claims the right to remove this gravel from opposite the lands of plaintiffs, and the point for determination is whether plaintiffs can prevent him.

Defendant contended that the point of commencement in the Crown grant being now some 10 or 11 years, and the lake, they are the owners of the land out of the lake waters, but I do not think that is the case. The grant relates to land on the shore of the lake, and as the lake widens the boundary of plaintiffs' land. But, to entitle plaintiffs to maintain this is not necessary for them to make title to any of the land covered by water. They are riparian proprietors, and have the right to have the beach or shore maintained in a way as will best protect their lands. Carrying away gravel gives the water easier access to plaintiffs' cultivation, and renders them liable, during storms, to encroachments they would not otherwise be liable to. It is, as a natural wall between the waters of the lake and the lands of the defendant, and defendant, proposing to tear that wall down, is restrained: *Attorney-General v. Tomline*, 14

v. Lavoia, 8 O. W. R. 398, 9 O. W. R. 117, it is held that the shore of a navigable inland lake is now well defined, and means the edge of the water at its lowest mark. The right to the lake shore "carries to the edge of the shore in its natural condition at low water mark." If this

be so, then the lands of the plaintiffs extend to the line of the water at low water mark, and so include the spot where defendant removed the gravel. My own view would be that a boundary at the shore of a lake would be that point where the ordinary wash ceased, and that all the sand or beach between ordinary low water and the nominal high water wash would form the shore. Again applying *Stover v. Lavoia*, it is said that a littoral or lacustrine proprietor has the right to protect his riparian privilege against any injury likely to arise from the wash of the waves and against the removal of sand or gravel which forms a natural barrier against the encroachment of the lake.

I find the fact to be that the act of defendant rendered the encroachment of the lake more likely, and the continued removal of the sand or gravel would work injury to plaintiffs' lands.

It was contended that the sand or gravel might shift or wash away by storms, and so the waters reach plaintiffs' banks. Of course, that might happen, and that is one of the risks incidental to plaintiffs' riparian position, but it in no way forms any excuse for defendant removing what the storms have not as yet washed away.

It was also argued that, as plaintiffs had at times sold gravel to defendant and others, they were in some way precluded from now complaining. I do not think so. Plaintiff *Alexander Servos* admitted that he had done so, but in ignorance of its injurious effects, and that he, now knowing the injury it had been to his land, was determined to stop further removal if he could.

Coppen, an owner some 5 or 6 lots away, said he had refused \$200 for leave to remove gravel from in front of his land, as such removal would be very injurious to the banks.

I think plaintiffs are entitled to an injunction restraining defendant, his servants or agents, from digging up or removing any sand or gravel lying between the banks of plaintiffs' lands and the waters of Lake Ontario.

I fix the damages for the trespasses already committed at \$20, and order defendant to pay plaintiffs' costs upon the High Court scale.

OCTOBER 1ST, 1907.

DIVISIONAL COURT.

PORT HOPE BREWING AND MALTING CO. v. CAVANAGH.

Company—Shares—Subscription—Increase of Capital Stock—Agreement to Take Shares before Issue of Supplementary Letters Patent—Amendment—Rights of Defendant under Contract.

Appeal by plaintiffs from judgment of MACMAHON, J.,
8 O. W. R. 985.

H. A. Ward, Port Hope, and C. A. Moss, for plaintiffs.

W. E. Middleton, for defendant.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), gave leave to plaintiffs to amend their statement of claim by setting up the contract made between plaintiffs and defendant, and directed that upon the amendment being made the plaintiffs should have judgment upon the contract for the amount of their claim, reserving, however, the rights of defendant under the contract. No costs of appeal or of action subsequent to issue of writ.

RIDDELL, J.

OCTOBER 2ND, 1907.

TRIAL.

FOSTER v. ANDERSON.

Vendor and Purchaser — Contract for Sale of Land—Construction—Time of Essence—Delay of Purchaser in Tender of Purchase Money and Deeds — Refusal to Award Specific Performance—Costs.

Action for specific performance of a contract for the sale by defendant to plaintiff of land.

W. J. Clark, for plaintiff.

G. H. Watson, K.C., for defendant.

RIDDELL, J.:— . . . An offer to purchase, dated 18th September, 1906, signed by plaintiff, was handed to defendant, who had by defendant been authorized to purchase, transmitted to her. She on 20th September, 1906, accepted this offer to purchase, and the offer so accepted to the real estate agent, and was handed to plaintiff. Shortly thereafter defendant became dissatisfied with the bargain, and so notified plaintiff. This solicitor, in conversation with the solicitor for defendant, made it clear that his client was dissatisfied with nothing in the conduct of defendant or her solicitor, and should or did lead plaintiff or his solicitor to believe that the terms of the contract would not be rigidly insisted upon. He accepted the evidence of defendant's solicitor to the effect except that I think the story told by the real estate agent in the interview between him and defendant's solicitor was substantially true. I have been unable to find any other part of the real estate agent, even if that would be the case, of this case, have made any difference.

The terms of the contract material to be considered are as follow:—

To Mrs. R. W. Anderson: I, G. B. Foster, do hereby agree to and with Mrs. R. W. Anderson to purchase all and singular . . . at the price of \$9,500 . . . \$100 in cash . . . on this 20th September, 1906, and covenant, promise, and agree to pay the balance on the closing of purchase and to execute a second mortgage for \$4,000, bearing interest at 5 per cent., payable monthly, and to assume the mortgage incumbrance now thereon. I have provided the title is good. . . . The purchase money shall be paid within 10 days from acceptance to investigation of my own expense. This offer is to be accepted by defendant on or before 10th October, 1906, otherwise void; and sale to be made on or before the said premises is to be given me, or I am to be given the said premises and be entitled to the receipt of the same and profits thereafter . . . Time shall be reckoned from the date of this offer. Dated 18th September, 1906. (Signed) G. B. Foster.

"I hereby accept the above offer and its terms, and covenant, promise, and agree with the said G. B. Foster to carry out the same in the terms and conditions therein mentioned. . . . Dated 20th September, 1906. (Signed) R. W. Anderson."

the provision that time should be "the earliest not only to the time at which the offer was to be made, but also to the time at which the offer so accepted was to be carried out.

Defendant has been ready to carry out the purchase on 10th October, and has tendered a conveyance for execution, according to the contract, with the \$1,400 and the second mortgage. In the contract, I have no doubt that the transaction has been closed, and that, though defendant's agent gave express instructions to receive money on behalf of the plaintiff, such a tender to him would have resulted in the completion of the purchase.

It is clear that the purchaser did not intend that the purchase should be completed on 10th October; he upon 10th October drafted a conveyance to the solicitor for defendant, and said in the letter: "I am sorry to inform you that the same is not yet executed, I am prepared to pay the purchase money at once. I understand that the purchaser at present resides in Austin, Texas, and that you are her solicitor and agent in this property. It is apparently intended by plaintiff that the deed should be executed to Texas, and upon the notification that the deed had been executed he would then pay the purchase money. This could not be until 2 or 3 weeks after 10th October.

At the point that no second mortgage had been paid, it seems to me that the delay of plaintiff is sufficient to prevent defendant from succeeding.

A court of equity would have looked upon a stipulation that time should be of the essence of the contract in the case of *Hurlow* (*Gregson v. Riddle*, cited by Romilly J.) as it is clear that such a clause is now as binding as in the law: *Fry on Specific Performance*, 3rd ed.,

the necessity of a tender have little bearing upon the case here under discussion. No doubt it has been held that a tender would have been a mere formality, and if it had been refused, it may well be dispensed with. See *Cudney v. Gives*, 20 O. R. 500, and the case is not merely an omission to tender, but there was an intention not to complete, and I have found the fact that a tender made upon 10th October would have been

Nor do the cases in which a defendant was not permitted to set up this defence when the omission to complete was due to his own default or misconduct, assist. There was nothing of the kind. In this view the action should be dismissed.

As between a plaintiff who desires to force the sale to him of property at an undervalue, and a defendant who refuses to complete a contract entered into with her eyes open because it will result in pecuniary loss, and defends on such narrow grounds as I have held to be successful in this case, there is not much to choose. In the exercise of my discretion, I do not award costs to either party.

OCTOBER 2ND, 1907.

DIVISIONAL COURT.

ARMSTRONG v. CRAWFORD.

Pleading—Counterclaim—Motion to Strike out—Irregularity—Co-defendants — Defence—Amendment—Convenience—Trial—Relief Asked—Setting aside Judgments—Declarations of Ownership—Mining Leases—Agreements.

Appeal by defendants Donald Crawford, Murdock McLeod, and John McMartin, from order of RIDDELL, J., ante 381, reversing order of Master in Chambers whereby the counterclaim of defendants Thomas Crawford and S. R. Clarke against the appellants was struck out.

G. H. Watson, K.C., and J. B. Holden, for appellants.

S. R. Clarke, for defendant Thomas Crawford and in person.

D. Urquhart, for plaintiff.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that the matters set up by defendants Thomas Crawford and S. R. Clarke were matters of defence as against plaintiff, and should be so pleaded, and not merely by way of counterclaim as against him. As against their co-defendants, such matters were properly pleadable only because pleadable in connection with plaintiff's claim, and then the proper way for

their seeking relief as against their co-defendants was by way of counterclaim. If these two defendants desired any relief as against plaintiff, they might specially ask for such relief by their prayer. If they desired relief, as well, against their co-defendants, then such relief must be asked by way of counterclaim as consequent on the matters pleaded in connection with plaintiff's claim.

Leave given defendants to amend in accordance with the foregoing views within one week, in which event this appeal to be dismissed. Costs of appeal to be costs in the cause. If defendants should not so amend, then this appeal to be allowed with costs. If amendments made, plaintiff and co-defendants to have 3 weeks to reply.

OCTOBER 2ND, 1907.

DIVISIONAL COURT.

DEWEY v. HAMILTON AND DUNDAS STREET R. W. CO.

Damages—Fatal Accidents Act—Action by Married Woman for Death of Aged Father—Reasonable Expectation of Pecuniary Benefit, from Continuance of Life—Reduction of Verdict—New Trial.

Appeal by plaintiff from judgment of RIDDELL, J., 9 O. W. R. 511, dismissing action, upon motion for nonsuit. after findings of jury in favour of plaintiff with damages assessed at \$2,000.

A. M. Lewis, Hamilton, for plaintiff.

J. W. Nesbitt, K.C., for defendants.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), ordered that if the parties should agree to a reduction of the damages to \$500, there should be judgment for plaintiff for that amount with costs. If the parties should not agree, new trial ordered, and costs of former trial and of this appeal to be costs in the cause.

CARTWRIGHT, MASTER.

OCTOBER

CHAMBERS.

PETTYPIECE v. TOWN OF SAULT STE.

Venue—Motion to Change—Convenience—Witnesses—Costs—Postponement of Trial

Motion by defendants to change venue from Sault Ste. Marie.

Grayson Smith, for defendants.

H. E. Rose, for plaintiff.

THE MASTER:—The action is in respect of lithic pavements laid by plaintiff at Sault Ste. Marie under a contract with the defendants, whose engineer supervised the work. This work was admittedly negligent. The statement of claim says this was owing to negligence and improper interference of defendants' engineer. The defendant has also not given any certificates on account as he says, but plaintiff alleges the contrary. The plaintiff says that he is entitled to further certificates as the engineer has been made a defendant for this. The plaintiff asks for a mandamus requiring him to give certificates as plaintiff is entitled to.

The notice of motion was served on 4th October. Both parties wished to cross-examine on the affidavits. The trial did not come on for argument until 1st October.

The defendants lay stress on the fact that the work was done at Sault Ste. Marie; and that, as their engineer said, it was so negligently and unskilfully done that to replace it would cost \$6,000. They say that, if it is replaced, it will be advisable that the town should have a view; the mayor and the engineer swear to 12 witnesses, several of them being the officers of the town. They rely on McDonald v. Park, 2 O. W. R. 812.

The plaintiff swears to 12 witnesses, and relies on cases as Halliday v. Armstrong, 3 O. W. R. 410, and Ald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773.

The cross-examinations of the mayor and the engineer seem to shew conclusively that at least 5 of the witnesses set out in their affidavit will not be required, i.e. the members of the board of works and the town clerk and

er hand, the cross-examination of the plaintiff way shewn that he will not require the witness to be deposed to as necessary, or that it would be more to have the trial at Sault Ste. Marie than at

think that the motion cannot succeed, and defendants are really being injured, they must be to the trial Judge for such direction as to costs as he thinks proper after hearing the evi-

d to postpone the trial until the non-jury sitting-ground of delay in bringing on the motion. was in the hands of the defendants, and they guarded themselves on this point if they so desire far more convenient and less expensive to Ste. Marie to Sandwich on the 14th instant December, at the non-jury sittings. In any defendants must be left to make a substantive modification. The plaintiff is not in any default so right to postpone the trial against his will. application he will consent.

t up by the plaintiff does not require any view the ground. The defence, on the other hand, at the Judge should have the opportunity, if he ful, of inspecting the pavements, assuming that covered deep with snow in the middle of December at Sault Ste. Marie being fixed for the 10th

a must be dismissed with costs in the cause.

OCTOBER 4TH, 1907.

DIVISIONAL COURT.

MAXON v. IRWIN.

Divisional Court—Appeal from Judgment of Divisional Court—Time — Division Courts Act, sec. 158—Decision Notified to Parties — Promissory Note — Word “Renewal” in Margin Erased — Alteration — Bills of Exchange Act, sec. 145 — Not Apparent — Holders in Due Course — According to Original Tenor.

plaintiffs from judgment of junior Judge of Essex in favour of defendant in an action

in the 5th Division Court in the county of E
\$102.47 on a promissory note, which had
erasing the word "renewal" in the margin.

The appeal was heard by FALCONBRIDGE,
J., RIDDELL, J.

J. H. Rodd, Windsor, for plaintiffs.

A. H. Clarke, K.C., for defendant, obj
appeal was not in time, and opposed it on the

RIDDELL, J.:—An objection was taken t
was not in time, the judgment being dated 5
the papers filed and appeal set down 22nd A
appears, however, that, while the written reason
are dated 5th August, the parties were not not
some time thereafter, and until within two
August, the first notice reaching plaintiffs' so
August. I think that the provisions of sec. 1
sion Courts Act, R. S. O. 1897 ch. 69, have
with. That section reads: "The appellant sh
weeks after the date of the decision complain
such other time as the Judge may by order
provide, file the said certified copy with the
of the High Court, and shall thereupon for
cause down for argument at the first sitting
Court which commences after the expiration
from the decision complained of," etc.

Not dissimilar language in the County Co
O. 1897 ch. 55, has already been interpreted b
Section 57 of that Act provides: "The appe
down for argument at the first sittings of a D
of the High Court of Justice which comme
expiration of one month from the judgment
cision complained of," etc.

It was held in *Fawkes v. Swayzie*, 31 O.
such opinion or decision is not pronounced
it cannot be said to be pronounced or deliv
parties are notified of it. While that decision
upon us, it recommends itself to reason, and
lowed.

But it is argued that in the section unde
in this case the terminology is different fro
County Courts Act. Here, it is said, the dat

present case is much more like *Garrard v. D. 30*, than *Suffell v. Bank of England*, 9 decided as the latter was upon a note of England, the distinction between which and promissory note is discussed by Sir George the case of an ordinary promissory note, Lord Coleridge, C.J., would probably be held : S. C., 7 Q. B. D. 270.

But, in the view I take, it is not necessary to consider whether the alteration is material. I think the proviso contained in the statute saves this note.

Section 145: ". . . Provided that where a bill has been materially altered, but the alteration is not such as to render the bill void, and the bill is in the hands of a holder in due course, the holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."

I conceive the "tenor" of a note to be the substance of which the maker intended to enter, as shewn by the bill employed.

The note sued upon would import a statement by the maker: "I agree to pay, one month after date, to the order of Norman & Dawson, \$101; but I shall not be bound by any bill of which the present is a renewal."

I am unable to see how this is not a promise for a certain amount of the renewal note. No doubt, if the word "renewal" had not been erased, there would have been difficulty in discounting it; and had the bank presented the note with the word "renewal" staring them in the face, they might have had difficulty in recovering it. But that is not the test. The note is in their hands, and they know that it is a renewal—they are innocent holders for value, and the statute entitles them to enforce the promise contained in the note in their hands without regard to any implied reference to a pre-existing note which they might have taken.

I think the appeal should be allowed with costs, and the original judgment of the County Court Judge affirmed.

FALCONBRIDGE. C.J., agreed that the appeal should be overruled, for the reasons stated by Mr. Justice Giddell, J.

He was of opinion, for reasons stated in his dissenting opinion, that the alteration in the note was material; referring to 11 Cn. 270; *Master v. Miller*, 4 T. R. 320; *Davis v. Bank of England*, 13 M. & W. 343; *Suffell v. Bank of England*, 9 M. & W. 343; *Knill v. Williams*, 10 East 431; *Garrard v. L. & N. E. Ry. Co.*, 10 D. 30.

He was, however, of opinion that the alteration was not "apparent;" referring to *Leeds Bank v. Wallis*, 10 D. 84; *Schofield v. Earl of Lonsdale*, 10 D. 84; *Schofield v. Earl of Lonsdale*, 10 D. 84; *Cunnington v. Peterson*, 29 O. R. 346; &c.

in due course, and entitled to recover upon
g to its original tenor.

agreed in allowing the appeal with costs
e original judgment.

agreed in the result.

OCTOBER 4TH, 1907.

DIVISIONAL COURT.

F NEWBURGH AND COUNTY OF LEN-
OX AND ADDINGTON.

*ations—Liability of County for Mainte-
e Crossing River—Width of River—Munici-
313, 616.*

e county corporation from judgment of
Court of Lennox and Addington finding
corporation are required wholly to build
ain bridges crossing the Napanee river, in
wburgh, and that the duty or liability of
maintaining the bridges belongs and rests
corporation.

K.C., for appellants.

K.C., for the village corporation.

of the Court (MULOCK, C.J., ANGLIN, J.,
delivered by

The question turns upon s. 613 of the Con-
al Act, 1903, which provides (sub-sec. 3)
ty council shall have exclusive jurisdiction
crossing streams or rivers over 100 feet in
limits of any incorporated village in the
cting any main highway leading through
sec. 616, sub-sec. 2, which imposes upon the
e obligation to maintain such bridges. .

The river in question, where it passes through Newburgh, divides into two channels, which enclose an island. These two channels at that point divide the river. The river is more than 100 feet above and below the island. The road, which crosses the river, is a highway leading through the county, passing the two channels by bridges. The channel crossed by the bridge is 38 feet in width, and the channel crossed by the other bridge is 80 feet in width. The island contains

The question is, whether, under the Act of 1862, the council has exclusive jurisdiction over these streams. The statute declares that the county council shall have jurisdiction over all bridges crossing streams more than 100 feet in width.

The statute, in our view, has reference to the width of the river, and not to the length of the bridge. The two channels of the river being together admittedly more than 100 feet in width at the place where it is crossed by the bridge, the matter is concluded. The case is therefore decided in the purview of the statute. See *Regina v. Carleton*, 1 O. R. 277.

Appeal dismissed with costs.

OCTOBER

C.A.

RE GIBSON.

Lunatic—Detention of Alleged Lunatic in Asylum—Authority — Medical Certificates — Habeas Corpus—Motion for Discharge—Remand—Direction for Trial of Issue as to Sanity—Appeal pending Trial.

Appeal by D. H. Gibson, an alleged lunatic, from an order made by TEETZEL, J., on the return of a writ of habeas corpus, remanding the appellant to the custody of the superintendent of the Mimico asylum for the insane.

was heard by MOSS, C.J.O., OSLER, GARROW,
REDITH, JJ.A.

lough and L. C. Smith, for the appellant.

right, K.C., for the superintendent.

O.:—The return to the writ shews that the
ained at the Mimico asylum for the insane
ificates purporting to be given by two medi-
s, as provided by R. S. O. ch. 317, secs. 8 and
d by the appellant that there are informali-
ificates sufficiently grave and important to
as authority for the detention. But it also
affidavits made by the superintendent and
whose observation and charge the appellant
g his confinement, that his state of mind is
er it utterly unsafe to trust him outside of
n in the care of the best qualified and most
rses. The statements and opinions of these
questioned on behalf of the appellant, but
to make it quite apparent upon the present
would not be proper, in the public interest,
to liberty, even though the objections to the
uld prevail: *Re Shuttleworth*, 9 Q. B. 651;
r, *Re Greenwood*, 24 L. J. Q. B. 148. In the
ridge, J., who was one of the Judges who took
dgment in *Re Shuttleworth*, said (p. 152):
reminded of what had fallen from the Court
asions when defects of a formal nature in
icates have been urged as the ground for dis-
cs; and I still feel that, in such cases, when in
appears clear that the party confined is in
mind that to set him at large would be dan-
to the public or himself, it becomes a duty
in the common law jurisdiction of the Court,
it, to restrain him from his liberty until the
dinary means can be resorted to of placing
manent legal restraint."

ent state of the evidence, the proper course
out the matter in train for a full investigation
as to the sanity of the appellant, and as to
permitting him to be at large.

termination of questions of this nature in ordin-
e Court may, in the exercise of its powers,

direct the trial of an issue, withholding in the meantime its decision on the appeal: Rule 817. And in more than one instance a similar practice has been adopted on the hearing of an application upon the return to a writ of habeas corpus: In re Andrews, L. R. 8 Q. B. 153; In re Guerin, 58 L. J. M. C. 45 n.; and in our own Courts the well known case of Re Smart.

None of these cases was that of an alleged lunatic, but there appears to be no good reason why the rule should not be applied in such a case as well as in others.

The order now made is that the parties do proceed to the trial of an issue in which the question shall be whether the appellant is at the time of the inquiry of unsound mind and incapable of managing himself or his affairs, and whether, if being found insane, he is dangerous to be at large.

The form of the issue is to be settled between the parties, or, in case of disagreement, by a Judge of this Court in Chambers.

The proceedings in the appeal are to stand over pending the trial of the issue or until other order of the Court.

OSLER and MEREDITH, JJ.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., concurred.

OCTOBER 4TH, 1907.

C. A.

REX v. ING KON.

Liquor License Act—Order of Magistrate Directing Destruction of Liquors—Order of High Court Quashing—Right of Informant to Appeal to Court of Appeal under sec. 121—Order Quashing Right on Merits—Refusal of High Court to Protect Informant from Action—Discretion—Appeal.

Appeal by the Attorney-General and the informant from an order of a Divisional Court (MULOCK, C.J., ANGLIN,

J., CLUTE, J.), quashing an order made by one of the police magistrates for the city of Toronto for the forfeiture and destruction of certain liquors seized by the police in the possession of defendant, a Chinese grocer and medicine dealer in the city of Toronto. The liquors were alleged to be medicines, and to be worth several hundreds of dollars. The defendant was also convicted for an offence against the Liquor License Act. The Divisional Court refused to quash the conviction, but quashed the order for destruction without costs, holding that it was unauthorized, and refused to protect any one but the magistrate.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A..

J. R. Cartwright, K.C., for the Attorney-General.

F. R. MacKelcan, for the informant.

W. E. Raney and A. Mills, for defendant.

OSLER, J.A.:—Ing Kon was on 9th July, 1906, convicted by a police magistrate for the city of Toronto of the offence of keeping liquor for sale without license, and fined \$20. In the formal conviction, as returned, appears a declaration by the magistrate that the liquor and vessels containing the same are forfeited to His Majesty, and an order or direction that the informant, Archibald, do forthwith destroy the same. The conviction was not drawn up until some considerable time after it had been made, and probably not until it became necessary to do so for the purpose of making a return to a writ of certiorari, which was afterwards obtained by the respondent for the purpose of an application to quash the conviction and order. The informant had notice of the intention of the respondent to make such application, but, being of opinion, as it would seem, that he could not do so successfully, destroyed the liquor.

A motion to quash the conviction and set aside the order was afterwards discharged so far as the conviction was concerned, but the Court, being of opinion that there was no evidence on which the magistrate was justified in forfeiting and directing the destruction of the major part of the goods of the respondent, which had been seized by the informant, quashed and set aside that order, and directed that no action should be brought against the magistrate. A motion which was afterwards made to the Divisional Court, on behalf of

the informant, to vary the order by extending the protection to him and others concerned in the destruction of the goods, was afterwards dismissed, and the present appeal is brought by him from the orders of the Divisional Court: from the first, in so far as it sets aside the order for the forfeiture and destruction of the respondent's property; and from the second, in so far as it refuses relief to the informant by protecting him from an action.

I am not satisfied that sec. 121 of the Liquor License Act gives an appeal to the informant from the order of the Divisional Court setting aside the declaration of forfeiture and order for the destruction of the respondent's property. The appeal thereby given is from any judgment or decision of the High Court, or Judge thereof, upon any application to quash a conviction made under the Act, or to discharge a prisoner who is held in custody under any such conviction, whether such conviction is quashed or the prisoner discharged or the application is refused. The order and direction in question is not necessarily part of the conviction, which consists of the finding of guilt and the imposition of the penalty. The order and direction may be in the conviction, or may be by a subsequent or separate order: sec. 131 (2); and where that is the case, no appeal is given. Why should there be any difference in that respect, where the order is set forth in the conviction? Moreover, the appeal given by sec. 121 is only "whether such conviction is quashed, or the prisoner discharged, or the application is refused;" and the informant cannot complain of the judgment of the Divisional Court in any of these respects, as the conviction was affirmed.

It is, however, unnecessary to decide in this case whether an appeal lies from the principal order complained of under the Liquor License Act, or the Judicature Act, because upon the merits, which were heard subject to the objection to the jurisdiction, it is clear that the order of the magistrate cannot be supported, and that the order of the Divisional Court, setting it aside, should be affirmed. There was really no evidence before the magistrate that the liquors the destruction of which is complained of were liquors which the respondent might not lawfully sell, and which were not protected by the provisions of the Act and its amendment. The contrary, indeed, was abundantly proved. The liquors were shewn to be medicines or com-

pounds prepared, sold, and used as such, and were within sec. 3 of the Act 61 Vict. ch. 30, and, as such, expressly exempted from the operation of the Liquor License Act, sec. 2 (1), as amended by 6 Edw. VII. ch. 47 (O.), sec. 1 (2) (a).

The second order of the Divisional Court, refusing to extend to the informant the protection which it was thought right to give to the magistrate, was made in the discretion of the Court, a discretion which, if I may say so, was, under the circumstances, rightly exercised, and may serve the purpose of teaching police officers to temper zeal with discretion in carrying out prosecutions under the Act.

I think the appeal should be dismissed with costs.

MOSS, C.J.O., and MEREDITH, J.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., concurred.

OCTOBER 4TH, 1907.

C. A.

BRENNER v. TORONTO R. W. CO.

New Trial — Misdirection — Reversing Order of Divisional Court Directing New Trial—Objection not Taken at Trial —Negligence—Street Railways—Injury to Person Crossing Track—Contributory Negligence—Ultimate Negligence—Rules of Street Railway Company — Substantial Wrong or Miscarriage.

Appeal by defendants from order of a Divisional Court setting aside a judgment for defendants upon the findings of a jury, and directing a new trial, upon the ground of misdirection, in an action to recover damages for injuries sustained by Eva Brenner, one of the plaintiffs, by being struck by a car of defendants when attempting to cross Queen street west, in the city of Toronto, opposite University avenue.

the informant, to vary the order by extending the protection to him and others concerned in the destruction of the goods, was afterwards dismissed, and the present appeal is brought by him from the orders of the Divisional Court: from the first, in so far as it sets aside the order for the forfeiture and destruction of the respondent's property; and from the second, in so far as it refuses relief to the informant by protecting him from an action.

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pounds prepared, sold, and used as such, and were within sec. 3 of the Act 61 Vict. ch. 30, and, as such, expressly exempted from the operation of the Liquor License Act, sec. 2 (1), as amended by 6 Edw. VII. ch. 47 (O.), sec. 1 (2) (a).

The second order of the Divisional Court, refusing to extend to the informant the protection which it was thought right to give to the magistrate, was made in the discretion of the Court, a discretion which, if I may say so, was, under the circumstances, rightly exercised, and may serve the purpose of teaching police officers to temper zeal with discretion in carrying out prosecutions under the Act.

I think the appeal should be dismissed with costs.

MOSS, C.J.O., and MEREDITH, J.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., concurred.

OCTOBER 4TH, 1907.

C. A.

BRENNER v. TORONTO R. W. CO.

New Trial — Misdirection — Reversing Order of Divisional Court Directing New Trial—Objection not Taken at Trial —Negligence—Street Railways—Injury to Person Crossing Track—Contributory Negligence—Ultimate Negligence—Rules of Street Railway Company — Substantial Wrong or Miscarriage.

Appeal by defendants from order of a Divisional Court setting aside a judgment for defendants upon the findings of a jury, and directing a new trial, upon the ground of misdirection, in an action to recover damages for injuries sustained by Eva Brenner, one of the plaintiffs, by being struck by a car of defendants when attempting to cross Queen street west, in the city of Toronto, opposite University avenue.

There is nothing whatever that took place in of the jury, from first to last, throughout the t tracts in any manner from these observations as of the rules, nor anything in any manner withd as evidence—the same as all the rest of the duced—from the consideration of the jury.

There was, therefore, no misdirection su tiffs contend for.

In these circumstances, it is not to be won there was no sort of objection to the Judge's c respect; it would indeed be rather surprising been, on the plaintiffs' part. Search as one ma the very many requests, objections, and observati tiffs' counsel, nothing of the sort can be foun was clearly not a case of omitting anything whic been said, or of saying too little.

In regard to the charge generally, it may, safely said that if all charges afforded as much painstaking and accuracy, there would be very reasonably found fault with; though it is certain to allow another speech to be made in the pre jury in the guise of objections to the charge.

And, as I have said before, there being no nor any objection to the charge on the ground tion, respecting the rules of the defendants, that there was no substantial wrong or misca sioned by any such misdirection.

It would be a thing very much to be regr of the Courts should drop into a loose practice new trials. One trial should, generally speaki enough; and no encouragement should be given of loose manner of conducting a trial, by any o to it, upon the notion that anyway, if they are enough, they can get another trial. The cost trial is a serious matter; the injustice of givin second chance, except for very substantial reaso fest. Besides, it must always be remembered t have certain absolute rights, powers, and duties. **The Court has no more right to invade or disrega** jury have to invade the province of the Courts, **guard their proper instructions; and that to gran** because the Court may not like the verdict, or u **substantial and established grounds, is really a dis** sole functions of the jury. and an invasion of th

...ence were to be weighed and the case notwithstanding the sympathy which one may, have for plaintiffs in their great misfortune, that the findings of the jury were not, even at warranted by the evidence? Can it be said cause of the accident was not the imprudent with the female plaintiff attempted to cross the And, if the position of the parties were respondents were here seeking a new trial under circumstances and on the like grounds, can it be that the application would be immediately dismissed a test is not always out of place.

...unable to perceive how any sort of injustice, point of view, was done to plaintiffs at the trial, good excuse for interfering with the verdict were rendered, or with the judgment directed ought to be entered thereupon, and would, therefore, appeal.

..., gave reasons in writing for the same conclusion.

..., agreed in the result, being of opinion that misdirection; and added that, in his opinion, hard and fast rule which absolutely prohibited entertaining an objection on the ground of when the party has omitted to take it at the

and MACLAREN, JJ.A., agreed in the result.

OCTOBER 4TH, 1907

C. A.

DUNCAN AND TOWN OF MIDLAND.

Order of Appeal—Leave to Appeal from Order of Court — Local Option By-law — Motion to Dismiss on Special Grounds for Permitting Second Appeal.

Duncan for leave to appeal from the order of Court, 10 O. W. R. 345, reversing order of

MULOCK, C.J., 9 O. W. R. 826, and dismissed) a motion to quash a local option town of Midland. The principal ground upon which it was sought to quash the by-law was that the council passed the by-law its third reading before the expiration of the time from the voting upon it, so that electors had no statutory time for seeking a scrutiny or recount and for a new cast.

The motion was heard by MOSS, C.J.O., OSBORN, J. B. MACLAREN, and MEREDITH, J.J.A.

J. B. Mackenzie, for the applicant.

F. E. Hodgins, K.C., for the town corporation.

THE COURT (MEREDITH, J.A., dissenting), refused to give leave to appeal, confined to the one ground mentioned.

MEREDITH, J.A.:—The applicant is seeking a double indulgence; the double exercise of the discretion of the Court in his favour.

In the first place he seeks the special leave to appeal in a case which was never appealable; and he seeks that leave from this Court at a late day, although he might have applied to the Court or a Judge of the High Court, or to a Judge of the Court, when the Court was not sitting, at any time before the pronouncement of the judgment of the Division Bench on the 2nd July, 1907.

In the second place he seeks the interference with the by-law in question, in the special and summary manner provided by statute for the summary disposal of by-laws; instead of having its validity questioned in a regular manner, that question properly arose in some matter in which the rights in civil or criminal proceedings.

In these circumstances, it is specially improper to bring into the substance of the appeal, its purpose, and its success.

The by-law is objected to on the highly technical ground that it was passed a few days sooner than it should have been. The other objections to it are unsubstantial, and have not been met with any encouragement anywhere. Assuredly it is not that it is invalid because prematurely passed, v.

can it be to the applicant to have it set not suggested that any one has been hurt in reason of the premature action of the council quite obvious that if it be set aside on that be regularly passed there: and surely, nothing in either substance or manner by the see-sawing it aside only to have it enacted again. . . . to bring myself to the point of taking part of leave to appeal in such a case; to see how special reasons for treating the case as ex- or allowing a further appeal: understand why should be granted where the inevitable re- its dismissal, without considering the legal it; or if for purely academic purpose it be adjudged in the appellant's favour, nothing of any sort of substantial benefit to any of erned, because what the Court does in set- aside one day, will be undone by the council ly passing it. Leaving the parties to their ts in all respects under the by-law as it is, other by-law which the council may pass if repass that in question or pass any other, in he only way in which they should in the first and should now be, left. se the application for leave to appeal.

OCTOBER 5TH, 1907.

CHAMBERS.

RE BARTELS.

*—Escape of Prisoner in Custody of Sheriff
 Argument of Motion for Discharge—Waiver of
 Prisoner under Writ — Voluntary Return of
 Custody of Sheriff—Quashing Writ—Appli-
 cation for Writ—Time—Extradition Act, sec. 23—
 with Presence of Prisoner.*

German Bartels senior for his discharge from
 ed, in the circumstances explained in the

judgment, after the proceedings set out and the alternative for a new writ of habeas corpus

H. H. Dewart, K.C., and N. Sommerville, for

T. D. Cowper, Welland, for the State of Ne

RIDDELL, J.:— . . . After his escape from the vigilance of the authorities for some time, he was finally arrested and arraigned before a police magistrate for the city of Toronto, and, pleading guilty to the offence of escape, he was sentenced to 3 months' imprisonment. His term was shortened by a few days through the intervention of the executive, upon condition that he surrender to the custody of the sheriff of Welland. This

Upon application to me under the leave granted to the solicitor for the applicant that there was no difficulty in the way of considering the merits of the application and I granted leave to serve a notice in the alternative judgment upon the motion already made, or for a new writ of habeas corpus. This was a matter argued before me at Osgoode Hall.

In my former memorandum I did not consider it necessary to deal with the application: see ante p. 386. No doubt I then entertained has been strengthened by further consideration, and an examination of the facts on the point.

Production of the prisoner having been refused, and not brought to the attention of the Court that he had brought him to Toronto, and I had no doubt that he was anywhere else than in the common gaol until I was informed by an officer of the Court that he had escaped. I then inquired of counsel for the prisoner what his client was, and was informed that he had been in custody during the morning, but that he was not in custody at the time. The argument proceeded, and at the conclusion of the judgment was reserved.

In law, it appears that upon the return of the writ upon the hearing, the prisoner is detained under the authority of the original writ. See *Bethel*, 5 Mod. 19. Whether this would be the case in the present instance, there having been no delin-

Court, or any officer thereof, I do not stop to consider. The prisoner was at the time of his escape in the custody of the sheriff of Welland as sheriff of the county under the original warrant, or in the custody of some other man as an officer of the Court under a writ of habeas corpus.

What is the effect of an escape after the issue of a writ of habeas corpus, and pending the argument?

I have searched in vain for any case in any county under the act of 1848, at all on all fours with the present. I cannot find any instance in which, like the present case, the prisoner was practically invited to escape, and the guarding of the prisoner was so utterly negligent. It is a dignify by the word "guarding" the act of the prisoner alone in the corridor of a public building.

There has been cited to me, and I can find none other, in the Courts of the mother land, or of her colonies, in which there was an escape at all, after the issue of a writ of habeas corpus. It will be necessary, then to decide the principle.

The purpose of the writ of habeas corpus is to enable the Court to have the legality of the imprisonment investigated, and, if that be illegal, to procure his discharge. See *Ex p. Cobbett*, 15 Q. B. 988. The writ is issued on the application of the prisoner himself or of some other person on his behalf.

The purpose of the writ of habeas corpus is . . . intended to secure the release of persons actually detained in unlawfully. . . ; it is the fact of detention and nothing more. See *Watson v. Ford*, [1892] A. C. 326, at pp. 334, 335.

The basis of the writ is the allegation, and the evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another person. See *Lord Herschell* at p. 339.

Attentot Venus, 13 East 195.

Now, if the prisoner, before judgment is given, himself puts an end to the detention, he

Y thereby waives all right which he might have by the writ. I am unable to distinguish such a case in which the detention had ceased before the writ—there it is clear the writ should not issue. *nardo v. Ford*, [1892] A. C. 326.

Some assistance may perhaps be derived from cases nearer in their circumstances to the present.

[Reference to *Regina v. Eavin*, 15 Jur. 100; *nardo v. Ford*, [1892] A. C. at p. 535, per Lord Macnaghten.]

X In view of these cases and upon principle, I am of opinion that at the time of the conclusion of the writ, the prisoner having by his own act discharged himself from custody, he thereby waived all rights he may have by the writ, and that, had I given judgment accordingly, I should have declined to make an order for his release.

There are cases in some of the Courts of the United Kingdom which may be referred to. Reference is made in *Church on Habeas Corpus*, 2nd ed., p. 100. . . . *Ex p. Walker*, 53 Miss. 366; *Harmood v. The Queen*, 57 Miss. 14; *Re Watts*, 3 O. L. R. 279, 1 O. V. 100; *Hurd on Habeas Corpus*, 2nd ed., p. 249, and *Lord Macnaghten* there cited; *Ex p. Robinson*, 6 McLean, 355, 10 O. W. R. 338.

X Does the fact that since that time the prisoner has again come into the custody of the same sheriff make any difference? I think not—the judgment should be given now that should have been given at the close of the writ, and that is, that the writ should be quashed.

The next question to consider is whether a writ should issue.

In . . . *Rex v. Robinson*, 10 O. W. R. 338, 10 O. V. 100, I held that after a writ of habeas corpus had been granted and the prisoner remanded to custody upon condition, the Court was not necessarily precluded from granting a second writ of habeas corpus, notwithstanding *Taylor v. The Queen*, 10 O. R. 475. That decision has not been appealed from. I see no reason to depart from it, and I now affirm it. I am of opinion that there may be circumstances in which a second writ may issue other than those su-

—and that where there has not been an adjudication of the merits, though the applicant seeks for such

ed, however, that the application for a second writ, and sec. 23 of ch. 155, R. S. C. 1906, is re-enacted in that section provides: "A fugitive shall not be removed until after the expiration of 15 days from the date of his committal for surrender; or, if a writ of habeas corpus is granted, until after the decision of the Court re-

any such provision is to be found in the early legislation of Upper Canada. The first Act is (1833) 3 Wm. IV. ch. 1, upon being carried into the Revised Statutes of Canada in 1843, becomes 3 Wm. IV. ch. 6 (see p. 100), and is consolidated in 1859 in C. S. U.

The statutes of the province of Canada contain no such provision (1849) 12 Vict. ch. 19, consolidated in 1859 in C. S. U. ch. 89. Nor the Imperial legislation, 6 & 7 Wm. IV. ch. 1, which may be read in extenso in Egan's Law of Canada (1846), pp. 36 et seq.

A provision of this character is to be found in the Act of 1868, 31 & 32 Vict. ch. 94, sec. 3, which reads: "it shall be lawful for the Governor, at any time more than 7 days after the commitment of an accused person . . . to order the person . . . to be removed to the United States." This chapter was printed amongst the reserved Acts. The legislation of 1886, 33 Vict. ch. 25, did not affect this. The Act of 1886, 33 Vict. ch. 127, though formally repealed by the Act of 1906, 40 Vict. ch. 25, was never printed. The Act of 1906, sec. 17, for a period of 15 days in lieu of 7, was provided, and this was continued in sec. 16 of the Act of 1886 ch. 142, now appearing in sec. 23 of the Act of 1906 ch. 155.

This provision is well known to have been introduced by the case of *Ex p. Ernest Sureau Lamirande*, 10 B. & C. 30. . . . Lamirande had been charged with making false entries in the books of the Bank of France and thereby defrauding the bank of 700,000 francs.

He was arrested in Montreal, and on 22nd late in the evening, fully committed for extradition. On the 23rd notice was served, on his behalf, upon representing the Crown, of the presentation of the 24th at 1 p.m. for a writ of habeas corpus. The petition was presented by counsel in presence for the Crown and for the French government. In argument it was pressed that attempts had been made to bribe his captors to bring him into the United States. That he had been threatened from the beginning that if he did not accept the law, he would be brought back to France. For the Crown protested against insinuations to disparage the institutions of the country, when, as a prisoner was fully protected by the fact that he could not be extradited except on the warrant of the Governor-General. As counsel for the Bank of France desired to adjourn the case was adjourned till the following morning. On the following morning a writ of habeas corpus was ordered. Judge (Drummond, J.) says: "I would have issued the writ before adjourning, had the counsel for the prisoner insisted upon it. But that gentleman was, no doubt, influenced by a sense of false security by the indignation displayed by the Crown, when counsel for the prisoner insisted upon his apprehension that a coup de main was in order to carry off the petitioner before his case had been heard. Upon the return to the writ it appeared that on the 24th, at midnight, the prisoner had been taken over to an officer from Paris by virtue of an order of the Governor-General, ostensibly signed by him. On the 23rd, he being at that time in Quebec; the order was registered at Ottawa before its signature by the Governor-General. So that, when the case came to be heard for the petitioner" was "on the high seas, swept away by the most audacious and hitherto successful attempt to reach the ends of justice which had yet been heard of. The Court, therefore, made no order as to the

It was due to the scandal created by the proceedings in this case, and to prevent the repetition of a transaction, that the section referred to of the Act of 1868 was passed. This legislation was not intended to diminish the rights of the prisoner—it only does not diminish the rights of the prisoner—it only to and does extend them.

mentioned that the omission of the Court to
 as to the prisoner supports the conclusion
 at on the first point for decision.

ing, therefore, in the Act preventing the issue
 of habeas corpus, and I accordingly order it.
 will be made, but, by consent, the presence
 will be dispensed with. This is the practice X
 invariably followed in our Courts. I remem-
 ber in my experience in which the prisoner was
 heard in Court; and this seems to be a practice
 by the Supreme Court of the United States:
 4 U. S. 160, 162.

may be brought before the Judge of the
 the parties desire, the matter having been partly
 I shall fix a day for the argument before

seen that this judgment proceeds upon the X
 far as the former writ is concerned, the pris-
 oner employed its efficiency by his own act—but, in re-
 application for a new writ, while the prisoner
 against the laws of our land, he has been punished
 thereby expiated his offence, and is entitled to
 consideration as though he had not offended.

in my view, necessary, on my dismissing the
 judgment, to do so without prejudice to the
 for a second writ, or in granting the application
 writ to reserve leave to raise upon the argument
 against the issue of the same—to avoid ques-
 tion.

not consider whether it would not be a perfect
 application for discharge under the second
 that the prisoner is not in involuntary but in
 confinement—the sheriff came in possession of him X
 of his own consent, as it was his acceptance of the
 pardon of His Excellency which alone per-
 would justify his being in custody at this time
 of Welland. It may be considered by the
 the application that the act of the prisoner
 placing himself in the custody of the sheriff
 considered a waiver of any right he otherwise

would have to be free from such custody—at least at the expiration of the term of imprisonment in the T

Such questions as these may be better dealt with by the Judge hearing the application and after argument.

NOTE:—Upon the reading of this judgment, the prisoner stated that he abandoned the application for a new writ—as, if a new writ were to be issued, the purpose was to prevent his client being tried at the sittings of the Court then imminent.

THE
D WEEKLY REPORTER

TORONTO, OCTOBER 17, 1907.

No. 21

MASTER.

OCTOBER 7TH, 1907.

CHAMBERS.

WILLIAMS v. CUMMING.

*Payment—Promissory Note— Action on—De-
sement by Defendants before Payees of Note
of Previous Decisions.*

plaintiffs for summary judgment in an action
note payable to plaintiffs and indorsed by
re delivery to plaintiffs, by whom it was
used without recourse.

etion, for plaintiffs.

Aylesworth, for defendants.

:—It was not denied that defendants might
if Canadian Bank of Commerce v. Periam,
still binding. But it was said that this case
ed by Robinson v. Mann, 31 S. C. R. 484.

t the report of the latter case in 2 O. L. R.
at the doctrine of the earlier case was af-
ough the case was not decided on that ground.
Court the appeal was dismissed, though the
declined to accede to the law as laid down
case. But the appeal was not dismissed on
it would probably have been if the indorser
been seeking to defeat the plaintiff's claim
y of the case in 31 O. R. 116. There the
nsolvent plaintiff was seeking to have a chat-
en to the defendant set aside, on the ground

that the defendant had never incurred any indorsement. The defendant, however, had and had never raised any question of the right to recover from him.

It does not, therefore, seem that this is an overruling of the earlier decision as to precluding the defendants from raising the question again, and which the Court, as at present constituted, would, on due consideration to what was said in *Robinson v. Bland*, would not be bound to follow the view expressed in *Robinson*.

In the head-note nothing is said about *Commerce v. Perram*. At the most, all that can properly be said would be that it was commented on.

The defendants will, therefore, have leave to move for judgment that they should in every way facilitate as speedy a trial as possible, and on these terms the motion will be granted, with costs in the cause, and defendants should pay the costs of the 12th instant.

[See *Slater v. Laboree*, 10 O. L. R. 648, 6 O. R. 100.]

CARTWRIGHT, MASTER.

OCTOBER 10, 1900.

CHAMBERS.

MARJORAM v. TORONTO R. W.

RE SOLICITOR.

*Costs—Settlement of Action—Payment by
Plaintiffs' Solicitor's Costs—Practice—Costs—
—Præcipe Order for Taxation—Offer to pay
Costs—Reference to Taxation—Costs of.*

Motion by plaintiffs' solicitor for an order requiring the defendants to pay to him, after taxation, all the costs of the action, and that the plaintiffs would have to pay him, and motion for an order requiring the solicitor to set aside a præcipe order, obtained by the defendants, in favour of one of the plaintiffs, for taxation of the costs of the action, delivered to the applicant.

J. MacGregor, for the solicitor.

Frank McCarthy, for the plaintiffs and defendants.

ER:—The action was begun pursuant to in-
retainer on 14th August. The writ of sum-
ed and served on 16th, on which day defend-
ified by plaintiffs' solicitor that he claimed a
ts on any fruits of the action.

day defendants' solicitors wrote to plaintiffs'
g that the action had been settled, and con-
company, however, protected you as to your
and if you will be good enough to forward
um of same, we will endeavour to adjust them
rself and defendants" (sic).

plaintiffs' solicitor wrote to defendants' solici-
ugust, saying: "Inclosed herewith I send you
my costs as solicitor for the Majorams,
\$40.70. Your cheque for this will oblige."

answer was sent, and on 28th August plain-
wrote again asking for cheque as above.

not answered, but, after a third letter to the
defendants' solicitors wrote on 5th September

Marjorams had been in to see about the costs,
15 in full without taxation.

ptember plaintiffs' solicitor wrote declining
asked defendants' solicitors to consent to an
tion, which he inclosed or sent later, and to
returned so that he might add his subsequent
eed in the regular way to obtain taxation.

' solicitors replied on 13th September, m a
ay, speaking of raising their offer to \$17.70
out ignoring the other two requests.

rther was done until, on 19th September, plain-
served on defendants' solicitors a notice of
order directing defendants to pay him "forth-
tion all such costs as the plaintiffs would have

xt day defendants' solicitors took out a præ-
the application of one of the plaintiffs, for tax-
bill delivered to the applicant, and next day
pointment to proceed thereon on 1st October.
solicitor thereupon moved to set this præcipe
ecause: (1) no bill had been rendered to the
(2) because having elected, at the invitation
solicitors, to apply for an order for taxation
the præcipe order was irregular. . . .

I think that the effect of the letter of 16th an admission by defendants' solicitors that defendants in their hands money to be paid to plaintiffs in satisfaction of the action, from which plaintiffs' solicitor was first to be satisfied. The parties not being able to agree to the proper amount, plaintiffs' solicitor as early as September was anxious to have the amount ascertained and forwarded the necessary order for taxation, with the expectation that defendants would consent to it, and save the trouble of a motion. This was the proper course to take if it had been agreed to by the other side. The writ of *præcipe* order was unnecessary, though not irrelevant, perhaps as made on the application of one only of the plaintiffs: see *Port Hope Brewing and Malting Co. v. O. W. R.* 974. But this point was not taken at the trial, and I refrain from any express decision upon it.

It was not necessary to move against the writ of *præcipe* and that motion will be dismissed, but without prejudice to an order will be made on the other motion referring the matter of the taxing officers to ascertain the amount payable by the solicitor, consolidating with it the writ of *præcipe* order, and the conduct of the matter to plaintiffs' solicitor, who is first and is the party on whom the onus lies.

The costs of this motion will be disposed of by the taxing officer in the reference, in view of the offer of the defendant's solicitor of \$15. The other offer was not sufficient to be taken into consideration on this point.

FALCONBRIDGE, C.J.

OCTOBER 1894.

TRIAL.

FRICKER v. BORMAN.

Covenant — Restraint of Trade — "Carry on or assist in Business" — Assisting Another in Business in Certain Circumstances — Costs.

Action for damages for alleged breaches of a covenant contained in an agreement of sale by defendant of a hotel business in Stratford, and for an injunction to restrain defendant from carrying on or assisting in the business of a hotel in Stratford.

covenant was as follows:—

The party of the first part agrees with the party of the second part that he shall not directly or indirectly carry on or be engaged in the hotel business in the said city of Stratford."

Sydney Smith, K.C., for plaintiff.

C. Makins, Stratford, for defendant.

L. CONBRIDGE, C.J.:—I find upon the evidence that the defendant did not directly or indirectly carry on or be engaged in the hotel business in the city of Stratford. He has previously assisted one Helm to raise money and other money to purchase and carry on such a business, but he neither has any interest in it by way of partnership nor in any other way pecuniarily. Defendant did act as bar-tender for Helm for two months, from about 14th November to 23rd January, and was paid \$100 wages for this service and there is nothing more due to him.

The writ was not issued until 22nd April last. The circumstances were very suspicious, and I was invited by the plaintiff's counsel to find that the whole scheme was a fraudulent and colourable one, but I cannot do so upon the evidence.

Under all the circumstances, while I dismiss the action, I do so without costs.

I refer to Roper v. Hopkins, 29 O. R. 580, and cases cited; Allen v. Taylor, 19 W. R. 556; Ross v. Anderson, 19 W. R. 682. The covenant in the last mentioned case is much more sweeping than the present one.

E. J.

OCTOBER 10TH, 1907.

TRIAL.

WILEY v. BLUM.

Principal and Agent—Agent's Commission on Sale of Mining Lands—Contract—Condition—Payment of Part of Price—Option—Abandonment.

Plaintiff claims to recover \$150,000 as commission payable upon the sale by defendant of some gold mining properties in the River district.

G. F. Shepley, K.C., and W. J. Elliott,
I. F. Hellmuth, K.C., for defendant.

MABEE, J.:— . . . The first step will
what the agreement regarding commission real
is no dispute between the parties over the fac
tain events plaintiffs would have been entitl
\$150,000 commission. The vendor, Anthony
intending purchaser, Dr. Von Hogen, were br
by plaintiffs, and as a result the followin
signed:—

“Toronto, 10th Nov

“Mr. Hugo Von Hogen,
500, 5th Avenue, New York.

“Dear Sir: I hereby agree and bind my
and my assigns, to sell and transfer to you an
all my rights and interests in the Laurentia
as mining location H. P. 371, located as Gold
regions of Rainy River district, Ontario, in
1,000 acres of mining locations, complete as
exists to-day, with a clear title in every way,
\$8,000,000. Payments to be made as follows:
will be forfeited if sale is not made as herein s
receipt and signing of this letter, and receip
hereby acknowledged; \$500,000 within 5 day
specification of the mine by you; \$2,490,000 withi
date hereof, after which you can take full po
mine; and \$5,000,000 within a year from dat
sum of \$200,000 has been expended by you i
work upon the property. All necessary pape
and sealed and signed immediately after the
the mine.

“Very truly
“A

“Accepted,
“Hugo Von Hogen.”

Nothing had been said about commissio
execution of this document, and plaintiff H
says that immediately after the agreement
it was arranged between himself and his brot
hand, and defendant and Von Hogen, on t
they (the plaintiffs) were to be paid \$300,000

in cash to be paid by defendant, and \$150,000 company, which was to be arranged by Von the cash payment of \$150,000 that is now in

version of the arrangement about the pay- mission is, that he told plaintiffs he had given 30-day option, and had received a \$10,000 was to be forfeited if the payment were not ed for in the option; that he then asked plain- mission they expected, and was told it should on the \$3,000,000 when it was paid; that Von might be divided, the defendant paying \$150,- e, Von Hogen, giving them \$150,000 in stock; payment was not to be made until defendant \$3,000,000; and that this was agreed to. De- e has not been paid the \$3,000,000; that, if he have paid the \$150,000 he had agreed to pay. s to me, the case turns upon the single point greement was for payment of the \$150,000 , or whether it was to be paid only when the s received by defendant. Von Hogen was so we have the evidence of 2 only of the 4 arrangement. Plaintiffs contend that they sale of the property, and that it was no fault money was not paid, and that it was the duty o obtain payment. I do not think the docu- as an agreement that could be enforced against d, as I read it, it seems to me a mere option ed time, for which Von Hogen was paying provision for forfeiting the cash payment if the completed would be nonsense upon any other s would also be the provisions regarding the he mine and the drawing and execution of the ately after such inspection.

wn by the plaintiffs that Von Hogen was a would have to interest capitalists in New transaction of this magnitude could be com- g the evening of the day the document was ntgomery, the defendant's solicitor, was called that in the presence of all parties, Von Hogen ing at once to New York to put the matter ple, and, if they were satisfied with it, an in- d follow, and then they would know whether go through or not. Mr. Montgomery also says

that he saw Mr. A. M. Wiley shortly afterwards him he was getting a commission "on this deal through;" that it was 5 per cent. in cash upon the sale, viz., \$150,000, and the same amount in stock. Montgomery saw that the stock payment was left in the hands of the defendant, and might lead to confusion, and saw the defendant Von Hogen on 28th November, and again saw Mr. A. M. Wiley on the evening of the same day, and informed him that he had seen the defendant and Von Hogen, and that the understanding of the matter was that Mr. Blum was to pay \$150,000 out of the \$3,000,000 cash when it was received, and Von Hogen was to give him \$150,000 stock in the Manhattan Cobalt Company when some \$6,000,000 of stock in the Laurentian Company was conveyed to the Manhattan Cobalt Company. Mr. Montgomery says that he then asked Mr. Wiley if he agreed to that as being the terms of the arrangement for the payment of the commission, Mr. Wiley said he did, and that that was satisfactory, also that Mr. Montgomery told Mr. Harold A. Wiley of this commission arrangement with Mr. A. M. Wiley, and he (Harold A. Wiley) said that any arrangement his brother made was his business, and Mr. Harold A. Wiley does not contradict Mr. Montgomery as to this; nor does he contradict the defendant as to this; that he (the defendant) told him on 10th November that \$150,000 was not to be paid until he got the \$3,000,000.

I have no alternative, therefore, but to find that the commission was only to be paid if the defendant received the \$3,000,000, and, as he has not got it, the act is not maintained.

A company was organized in Ontario, and the stock was conveyed to that company. Another company was organized in Maine, and the stock of the Canadian company was conveyed by the Maine company, in which latter company the defendant has \$12,000,000 of stock, and this represents the value of the acres of mining land covered by the option. The defendant holds stock in the Maine company, and is an individual, not a corporation, but I find that the defendant made no objection to the lands pursuant to the terms of the option, and refused at any time to convey according to its terms, and did nothing to prevent the sale contemplated by the option from being carried out.

Mr. Shepley relied upon *Passingham v. R.* 10 L. R. 392, but I am unable to see that it assists him. In the *Ring* case the defendant continued the

haser, obtained payment of portions of the
y, and took the negotiations out of the hands
f. In the present case, the bargain being for
mission only upon the purchase money to
the \$3,000,000 being received by the defend-
o me he need only shew he did not receive it,
ale went off through no fault of his.

ce is not at all clear as to why the sale did
h. The inspection of the mine was said to
actory, and it was also said the people behind
ere willing to furnish the money. However,
or tendered to the defendant, and the defend-
no way by any conduct of his rendered the
plaintiffs abortive, the case falls within the
ibbald v. Bethlehem Iron Co., 83 N. Y. 378,
Adamson v. Yeager, 10 A. R. 477.

wever, in view of the circumstances and of the
defendant obtained \$10,000 by reason of
the plaintiffs, I shall not offend against the
olding costs in dismissing the action.

missed without costs.

OCTOBER 10TH, 1907.

DIVISIONAL COURT.

SIMPSON v. T. EATON CO.

*Right — Obstruction of Access of Light to Win-
telling-house — Inconvenience — Injunction —
plying — Estoppel — Damages — Reference*

plaintiff from judgment of BRITTON, J., ante

was heard by BOYD, C., MAGEE, J., MABEE, J.

h, K.C., for plaintiff.

ley, K.C., for defendants.

BOYD, C.:—Plaintiff has a substantial grievance. His action should not have been dismissed. The court appears to err in applying the rules settled by the case of interference with ancient lights by the present case, where plaintiff's rights depend on conveyance to him from the common owner of the adjoining lot now owned by defendants. This is a case of modern windows which are to receive such a grant as they had at the time plaintiff's lot was severed from the lot now owned by the adjoining proprietor. Long, the owner of both, severed the lots by first granting a conveyance in short form of conveyance, to plaintiff's predecessor. That grant by express terms covered the light as a tenant or quasi-appurtenant, and, over and above that, was subject to the well-established rule that a grant cannot derogate from his own grant. As applied to the present case, that means that Long, having conveyed the house and windows in question thereon, could not afterwards, self or any one claiming under him, thereafter erect on the next adjoining lot he retained, which would diminish the light coming to the windows. No such structure has been made by defendants, who have erected a building on their lot about twice as high as that which existed at the time of the severance. This structure has been such as to obstructing the passage of light whereby plaintiff's windows have been darkened and artificial light has to be used in the evening. The structure complained of is a material and perceptible detriment to plaintiff's windows, lessens the beneficial enjoyment of them to a considerable and considerable extent. By this act defendants have done wrong under the grant made by Long, and plaintiff has the right to sue for the plain of it.

Plaintiff's inertness has been such that defendants have changed their position; so that the proper remedy is not by way of mandatory injunction, but by way of damages.

No evidence was given on this head, and the learned Judge has assessed the sum of \$300 in damages to be given, I do not think plaintiff should be allowed to recover by that, if he chooses to risk a reference. If the reference is not accepted, there will be a reference to the court, who may then dispose of the costs of reference (if the sum of \$300 is rejected) when he ascertains the amount of damages.

In any case plaintiff is entitled to the costs of trial.

I think the argument as to an outstanding mortgage of the severance, material, as that mortgage is discharged. Nor do I think that proper is tendered to shew that the mortgage was embraced in a subsequent mortgage under which it was exercised.

It is that the dismissal should be set aside and ordered for plaintiffs with costs—subject to refutation as stated.

—:—I agree.

—:—I agree in the judgment just read, except as to defendants, in addition to paying damages and being restrained from building the wall in question at now is, or from doing any other act upon the land in interference with plaintiff's easement of

OCTOBER 7TH, 1907.

TRIAL.

THE BRIDGE CO. v. TOWNSHIP OF AMELIASBURG.

and Taxes—Toll Bridge over Navigable Water—Connecting Municipalities—Interest of Bridge Assessable in Township in which one Half

For a declaration that a certain bridge owned by plaintiff was not liable to assessment by defendants, and for costs, etc.

—:— . . . The property owned by plaintiff is a bridge with its approaches affording a means of access to the mainland on the Belleville side of the Bay of Fundy, the mainland belonging to the county of Prince

Edward, in the township of Ameliasburg, the municipality. It is a bridge upon which toll is levied, which the public has right of access only upon payment of the statutory toll: 62 & 63 Vict. ch. 95, sec. 10. It is built on and over the marshes, islands, and navigable waters of the Bay of Quinte, but it is to be so used as not to interfere with navigation and other public uses of the water. sec. 10. This bridge property is, within the meaning of the Ontario Assessment Act, taxable land. By the levying of toll on all structures and fixtures placed upon, in, over, or adjacent to any public place or water, e.g., an interprovincial international bridge over navigable water, is the property of the Bridge Co. v. Gardner, 29 U. C. R. 194.

Section 43 (2) warrants the assessment of the property so far as the interest therein of the plaintiffs is concerned, leaving exempt the title and property of the Crown as provided by sec. 35.

Section 37 of the Act has no application to the property for here the property, though over a mile in length, is only a bridge. That section applies to a long bridge forming part of a toll road. It is held that the Bay of Quinte, over which the bridge passes, is navigable water, forming in law a public highway. The Act gives another right of way of legalized character over that water, upon payment, over that water, without interfering with the absolute further rights of passage and navigation. The law on this head is all covered by Niagara Falls Power Co. v. Town of Niagara, 31 O. R. 194.

The situation is analogous to the conjunction of a highway on land with a street railway running over the pipes of a private gas company laid thereunder. In such cases, notwithstanding the property of the Crown, the taxes are levied in respect of its beneficial use by the private proprietors.

The bridge is assessable as to the half within the area on its taxable value as a whole with the proportionment of the amount referable to the street on the Ameliasburg side.

The action should stand dismissed with costs.

OCTOBER 8TH, 1907.

CHAMBERS.

PIECE v. TOWN OF SAULT STE. MARIE.

to Change—Convenience—Witnesses—View—Costs—Postponement of Trial.

defendants from order of Master in Chambers, dismissing defendants' motion to change the venue to Sault Ste. Marie.

Smith, for defendants.

, for plaintiff.

, dismissed the appeal with costs to plaintiff

OCTOBER 9TH, 1907.

DIVISIONAL COURT.

MILLOY v. WELLINGTON.

Wife—Criminal Conversation—Death of Plaintiff—Cause of Action—Nominal Damages—Damages—Evidence—Rule 785.

defendant from judgment of BRITTON, J., 1899, in favour of plaintiff, upon the findings of the jury, at a second trial, for the recovery of \$500 in an action for criminal conversation. At the first trial the plaintiff obtained a verdict for \$5,000: 3 O. W. R. 100. A new trial was ordered by a Divisional Court: 18 O. L. R. 308; and this was affirmed by the Court of Appeal: 7 O. W. R. 862, 12 O. L. R. 24. The plaintiff died on 27th April, 1905, and an order was made giving the action in the name of the administratrix, which order the Master in Chambers refused to make: 10 O. W. R. 437, 10 O. L. R. 641.

Smith, K.C., and C. C. Robinson, for defendant.
Smith, for plaintiff.

The judgment of the Court (BOYD, C., MAGNUS, J.), was delivered by

BOYD, C.:—This case was sent down for a second time to the Court of Appeal in order to remedy a miscarriage of justice which arose from a verdict given for excess damages by the jury. This disposition was made of this case at the time when the record shewed that the plaintiff was pending action, and that it was being carried on by a personal representative under an order of revivor. This settles as *res judicata* the question as to whether to revive this action for criminal conversation, and thereby actually settles the question that more than nominal damages may be recoverable. Had there not been a verdict for substantial damage as contrasted with nominal damages, what reason was the burden of another trial thrown upon the litigants? The Court of Appeal was then inclined to say that nominal damages should be awarded, as in *Wainwright v. Mavor*, 100 L. T. R. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

One salient head of substantial damages was that the defendant, after he was aware that Mrs. M. was a married woman who had gone through a form of marriage, assumed the risk of going through a form of marriage, and so entered (in law) upon a course of adultery: *see* [1900] P. 297, 300. This was not connived at by the rightful husband—nor had there been any abandonment of marital relations as precluded a likelihood of restoration. This view, at all events, was taken by the jury, and there was no misdirection. *Keyse*, 11 P. D. 109, an unmeritorious husband neglected his wife, and took no care to look after her; he was allowed to recover £150 as solatium in this case—*a* larger sum than that here given. I refer to cases as *Tyrd v. Tyrd*, 14 P. D. 45, *Evans v. Evans*, 14 P. D. 195, and *Lord v. Lord*, *supra*, to shew that the latitude is given in arriving at damages in respect of nominal offences of this grave character.

I do not see my way clearly to intervene arrived at by the jury. I perceive no error, of moment, in the rulings upon the various dispute that occurred in the course of the trial—would not be covered and cured by the saving 785.

ent is affirmed with costs.

OCTOBER 11TH, 1907.

DIVISIONAL COURT.

SEGSWORTH v. DECEW.

Actions—Claim for Payment for Services—Quantum Meruit—Solicitor—Acknowledgment—Evidence—Costs.

defendant from judgment of TEETZEL, J., in plaintiff, a solicitor, for the recovery of \$800 in an alleged contract to pay plaintiff for services in connection with some property of defendant at Columbia, plaintiff having travelled there to see.

was heard by BOYD, C., MAGEE, J., MABEE,

son, K.C., for defendant.

rtson, Stratford, for plaintiff.

—Were this case before me in the first instance whether I should hold plaintiff entitled to quantum meruit for his services. The evidence is conflicting, and it is not made clearer by the various statements in the correspondence which cast much ambiguity upon the method of compensation. Plaintiff claims that he was paid \$1,000 agreed upon at the outset—the whole arising from his want of care as a solicitor in putting the claim into writing, and in the great delay in the prosecution of his claim. But I am unable to weigh the evidence and documents

more minutely, for I think the case fails because of the defence set up under the Statute of Limitation.

To my mind there is no sufficient promissory acknowledgment in writing to take the case out of the Statute. What is relied on for that purpose is the letter from the defendant to plaintiff of date 7th April, 1900, written in response to two earlier letters from plaintiff to the defendant (29th March and 19th April, 1900). But the whole correspondence is to be read before and after, and I think the result is that the letter relied on does not refer in any way—or, if in a most ambiguous way—to the fee claimed by the plaintiff. I think the subsequent letters written by the defendant, particularly that of 22nd May, 1900, and that of 29th May, 1900, shew that he did not regard the letter of 7th April as containing any allusion, much less any admission, to the claim now sued upon. There were several accounts of account and claim open between the parties, and these were the things referred to in this particular letter. The letter appears to be altogether silent in reference to the plaintiff's property and the fee claimed in connection therewith. The "account" which the plaintiff points to in his letter of 7th April, as being the reference to his "fee," has no connection with it, as I read the letter, but refers to his claim for services of about \$88, for the payment of which the plaintiff is making insistent and repeated claims.

Apart from this main difficulty as to the sufficiency of the acknowledgment, I doubt whether the words used, "We will have as well as you to have this account paid," amount to an admission of liability. (Query: Paid out of the land?)

Altogether there seems to be no right of action; but, in view of what may yet be recovered by the plaintiff for his services, I would dismiss the action with costs.

MAGEE, J.:—I agree.

MABEE, J., for reasons stated in writing, allows the appeal and the action with costs. He says that the appeal should be allowed and the action dismissed with costs.

OCTOBER 11TH, 1907.

DIVISIONAL COURT.

V. KEMP MANURE SPREADER CO.

Winding-up — Ontario Joint Stock Companies Act—Order under—County Court Judge—of—Action to Set aside Order—Fraud—Collusion—Jurisdiction of High Court—Appeal to Court of

plaintiff from judgment of ANGLIN, J., 9 dismissing with costs an action by a shareholder-plaintiff against a defendant company for a declaration that an order of winding-up of the company, granted by the County Court of Perth, was made without jurisdiction, and was obtained by fraud, collusion, and improper facts, and for an injunction restraining the defendant company from acting under the order, and especially restraining Jeffrey from acting as liquidator of the company.

on, K.C., for plaintiff.

e, K.C., for the defendant company and the company.

for defendant Miller.

nt of the Court (BOYD, C., MAGEE, J., MABEE, J.), decided by

—The Ontario Winding-up Act assigns the jurisdiction to the County Court, and provides that the orders and decisions of the Judge may be set aside if an order to wind up is made in violation of the provisions of the statute, or is obtained by fraud or misrepresentation, or is otherwise open to attack, any shareholder affected may obtain redress either by direct application to the Judge, when the order has been made ex parte, or, if made after notice, by appeal to the appellate court provided by the Act, the Court of Appeal. No jurisdiction is conferred by or given to any branch of the High Court.

Court to intervene and set aside or vacate what has been done by the County Court under the Ontario Winding-up Act. All the matters in this action are open for the consideration of the County Court, with an appeal from his decision (if not satisfactory) to the Court of Appeal. It is the duty of the plaintiff as a shareholder to seek relief against what has been done in the winding-up of the company by the County Court Judge. The company is not liable when it is contended that the Judge has acted in order or is misled by fraud, etc., is considered in the case of the Ontario Savings Loan and Building Association, 2 O. W. R. 366. Section 27 of the Act, which gives a "party" to apply for relief, is not restricted to a party to the proceeding complained of, but includes as including at least every member of the company aggrieved. See also sec. 33; *Welford v. 1* 503; and *Barber v. Osborne*, 6 H. L. C. 556.

I would dismiss the appeal
with costs.

OCTOBER

C.A.

REX v. HARRISON.

*Criminal Law—Conviction—Leave to Appeal—
Judge's Criminal Court—Court of Record—
Habeas Corpus and Certiorari—Proceedings Renewed
and not Returned when Sentence Pronounced—
Application for Reserved Case—No Substantial
change of carriage.*

Motion by the prisoner for leave to appeal from his conviction for perjury by WINCHESTER, Co.C.J. The County Court Judge's Criminal Court for the county of York for an order requiring the Judge to state the facts ante 35.

The motion was heard by MOSS, C.J.O. LAREN, MEREDITH, J.J.A., and MAGEE, J.

J. B. Mackenzie, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

J.A.:—The prisoner, who was accused of the
y, elected to be tried without a jury, and was
ly in the County Judge's Criminal Court,
guilty. An application was made at the trial
case, on several questions of law, but it was
onouncement of the judgment of the Court
ner was, however, postponed to enable him
is Court. An application was accordingly
ourt for a reserved case, but that was also
quently a writ of habeas corpus was ob-
prisoner's behalf, in the High Court, and
it of certiorari in aid, as it is called, of the

A return was made to the writ of certiorari,
r was brought up on the other writ, and then
for his discharge from custody was in due
on. That application was refused, and the
manded for sentence in the inferior Court,
that the writ of habeas corpus, and conse-
t of certiorari, had been improvidently issued,
corpus does not lie to a court of record (ante
ment of the inferior court upon the prisoner
ble offence of which he had been there found
reupon moved for, and it was pronounced,
t of objection being made on account of the
i or of anything that had been done under it.
to the writ of certiorari was never filed in the
nor were any of the papers which were re-
nor was the writ, but these papers had not
ack to the custody of the Clerk of the Peace
ment was pronounced; they were apparently
s of one of the officers of the superior court.
r the sentence had been so pronounced, the
n was for the first time raised, and an appli-
n made for a reserved case in respect of it,
sed, and this application is an appeal from

ecessary to determine the point, but I may say
from being convinced that the judgment so
invalid. The case is very different from that
of a justice of the peace brought up to the
d then filed, on a motion to quash it. The
writ of certiorari, issued. as this writ was,
ection of the Act for more effectually securing
the subject, are by that enactment expressly

limited to the end that the proceedings may be considered, "and to the end that the sufficient warrant such confinement or restraint, may be

Its purposes had been completely fulfilled. In addition to that, it had been adjudged that the writ should have been issued—the provincial Habeas Corpus Act expressly excepting a court of record out of its scope, the inferior court in question being a court of record. The prisoner had been sent back to be dealt with by the inferior court in the very manner which is now the law—of—to be dealt with in that court just as if there had not been wrongly interfered with and

It is easy to understand why the authority of the superior court should be superseded when a conviction is brought up on a writ of certiorari, to a higher court for review to questioning it—the superior court having jurisdiction in the matter—and when the conviction has been affirmed by the superior court, and why it should continue superseded by the order of the superior court compelling the inferior court to proceed; but none of the reasons are applicable to such a case as this; it is observed that its having that effect is conditional upon proper recognizances having been entered into and bail being necessary. But, however that may be, the existing law providing an appeal to this Court provides that "no writ shall be set aside or any new trial directed although it may appear that something not according to law has been done at the trial . . . unless, in the opinion of the Court on Appeal, some substantial wrong or miscarriage has been occasioned on the trial . . .;" and that principle covers this case, the pronouncement of judgment by the Judge being, of course, part of the trial.

If effect were given to this application, what would be the practical result? The judgment in question would be set aside, but only to be followed by a re-arrest of the papers to the Clerk of the Peace, with a new trial otherwise to the inferior court, and a repetition of the sentence—a mere waste of energy and expense without any practical use. That is quite without any of the objects of allowing an appeal to this Court.

I have assumed, without considering the question, that it is a right to appeal to this Court, although the application either orally or in writing to the

reserve the question now raised; and I express only.

dismiss the application.

A., gave reasons in writing for the same con-

O., MACLAREN, J.A., and MAGEE, J., con-

OCTOBER 11TH, 1907.

C.A.

v. EDMONDSTONE AND NEW.

*—Motion for Leave to Appeal from Conviction
and for a Reserved Case—Indictment for Rob-
b—Verdict of Guilty of Assault—Re-
dict—Interpretation.*

defendants for leave to appeal from a convic-
t, and for an order requiring the Judge of the
of Wentworth, before whom at Quarter Ses-
sions were tried, to state a case for the opinion

The defendants were indicted for robbery
. The jury found defendants not guilty of
guilty of assault. The verdict was recorded as
of "the assault as charged." Defendants were
ectively to 30 months and 18 months in the
tentiary.

n was heard by MOSS, C.J.O., OSLER, GAR-
N, MEREDITH, JJ.A.

Reilly, Hamilton, for defendants, contended
s no evidence to found a verdict for assault;
t was charged; and that the assault, if any,
n assault.

wright, K.C., for the Crown.

A.:—I think we should direct a special case to
the learned Chairman of the General Sessions

of the Peace for the county of Wentworth. T at the close of the trial, as reported and discl davit, leave it in some doubt whether the was entered upon the finding of the jury, a sentence passed. Enough appears to shew th is one fit for discussion and further considera press no opinion whatever as to what the resu The case as stated will, no doubt, disclose fully what occurred.

MEREDITH, J.A.:—The prisoners are, i stances of this case as stated upon this appli to a reserved case upon the questions: (1) w dict of the jury was rightly recorded; and, if it was rightly interpreted and acted upon Chairman of the General Sessions of the Pea

The case should state the circumstance the verdict was recorded, and the interpreta placed upon it for the purpose of pronoun ment which was imposed on the prisoners.

The doubts are: whether a verdict of an tion to a verdict of assault should have been whether the verdict as recorded imports anyt an assault and battery such as could be inclu of guilty of common assault.

MOSS, C.J.O., GARROW and MACLAREN, J.

M.
OCTOBER

DIVISIONAL COURT.

C. A.

HACKETT v. TORONTO R. W.

Negligence—Street Railway—Injury to Infan
Negligence—Findings of Jury

Appeal by defendants from judgment of C.J., at the trial, upon the findings of a ju the plaintiff, a boy of 11 or 12 years old, i damages for injuries sustained by him owing gence of defendants, as alleged.

as injured upon Gerrard street east, in the
o, on 23rd July, 1906, by a west-bound car,
tempting to cross the north track after getting
head of an east-bound car, upon which he had
a ride."

the jurors agreed upon the following answers
as submitted:—

the injury to the plaintiff, Gordon Hackett,
negligence or unlawful act of the defendants?

wherein did such negligence or unlawful act
by conductor on east-bound car not being on
; considering the distance the plaintiff rode,
me off as he should have done; the motorman
; accident not ringing gong, and not having
t.

as the injury to Gordon Hackett caused by rea-
a negligence? A. No, considering the speed
ed by getting off east-bound car, and that he
ss the street.

ould Gordon Hackett have by the exercise of
e avoided the accident? A. (Not answered.)
ere assessed at \$1,225.

art, K.C., for defendants.

regor and E. A. Forster, for plaintiff.

ent of the Divisional Court (MEREDITH, C.J.,
MAGEE, J.), was delivered by

C.J.:—We think that no purpose would be
ng further time to consider this case. It has
y discussed, and the evidence has been referred
that upon the whole evidence there was noth-
h the jury could reasonably find that the in-
y was caused by the negligence of the defend-

evidence, we think, that could not have been
m the jury, of the defendants' omission to
uty the breach of which the plaintiff alleges,
omission constituted negligence, but that is
entitle the plaintiff to recover. It must be
at negligence was the effective cause of the
boy.

The circumstances of the case were that trespasser upon the property of the defendant, while taking a ride, sitting upon the bar behind the car, going in the opposite direction to the one with which he had contact with him. Getting near to the place where he intended to go, he got off the car, and after, at a distance of 10 paces running with the car, at some portion of it, he started diagonally across the tracks, and while doing so a car coming in the opposite direction struck and seriously injured him.

According to the strongest testimony, as I understand it in favour of the plaintiff, he was, at the time he went to go across the track, only 10 feet away from the car which hit him down. He had then to cross the track at the end of the strip, and got, it is said, upon the other track at a distance probably of $2\frac{1}{2}$ feet; the car was running at a rate of 7 or 8 miles an hour, and he was run over.

Now, it seems to me it would be most unjust, under the circumstances, to fasten upon the motorman a blame which, because, in such an emergency—the boy coming suddenly from a place where he was not expected—he could not see and immediately apply the proper remedy. He had but two eyes; of course, he had to keep his eyes on the road, but the occurrence happened in the twinkling of an instant, and to say that the motorman was negligent, and his employers are liable, because of circumstances such as existed in this case, he did not see and did not apply the remedy, would be, I think, to make the defendants insurers against any accident that happens.

The plaintiff contends that the proper remedy was for the motorman had been on the look-out for the boy, seen the boy and have tripped the fender, and thus prevented the accident.

I think it would be mere speculation in the jury to say that the tripping of the fender would have prevented the accident.

It is suggested that if the gong had been rung, the boy would have been warned, and either would not have got on the draw-bar, or, if he had got off, would have been out of the car; but his own evidence is against that view. His evidence very frankly, and his testimony very honestly, is that the noise was such that if the gong had been rung, he would have heard it; and his own evidence is that he did not hear it.

that he could not stop, and that he did not

on the evidence, that if anybody was to blame the unfortunate boy himself, and, although this is a precedent, it is one for which these defendants should be made liable.

It is manifest that the jury were struggling—whether contributory negligence or not, it is difficult to say—to find fault with the plaintiff upon some ground or other. It is an extraordinary finding that, when asked as to contributory negligence, they say there was no contributory negligence, because the boy was running so fast in crossing the street—the very thing that probably amounted to negligence is that which according to the jury excuses the negligence.

The learned judge said that the principle of *Lynch v. Nurdin*, applies, and that the boy is of such tender years that the fault is not to be attributed to him. That case is of less application than this, that where the child is of such tender years as not to appreciate the danger of what amounts to contributory negligence cannot be attributed to him. The learned judge applied the doctrine of that case, and the learned judge followed it. In this case, I do not think *Lynch v. Nurdin* applies, because the boy was not of that type; he was an intelligent boy, and it is not age but intelligence that is the test in applying the principle of that case. The learned judge said that the appeal must be allowed, and the judgment entered dismissing the action.

The plaintiff appealed to the Court of Appeal, and his case was argued by the same counsel before Moss, C.J.O., and MacLaren, and Meredith, J.J.A.

The learned judge said:—I think the appeal in this case fails, and I dissent from the opinion upon the grounds stated by the learned judge, which appear to me to furnish sufficient grounds against plaintiff's right to succeed.

The learned judge said that the decision in *Preston v. Toronto R. Co.*, 1 L. R. 369, 8 O. W. R. 504, so strongly relied upon by the learned judge for plaintiff, governed this case, I should dissent in applying it in plaintiff's favour. But, in this case, plaintiff's position is totally different to that of the plaintiff in the case cited. And I cannot bring myself to think that the answer of the jury to the third

ing did not affect his actions; a thing which
 at without it. Had he sworn to the contrary,
 ans sure that that alone, in the face of all the
 of the case, would have afforded any reasonable
 which plaintiff would have been entitled to
 but it is not necessary to consider that ques-

excuse for the boy's negligence is an extra-
 They say that his negligence was not the
 e of his injury, "considering the speed the
 y getting off the east-bound car, and that he
 ss the street." That is to say, that the im-
 by his inexcusable wrong and carelessness in
 the draw-head of the car and getting off whilst
 n, excused his negligence in turning and run-
 ce of danger, without any sort of precaution,
 not wholly able to control his movements by
 impetus; or, put in other words, the natural
 ct of plaintiff's negligence in one particular
 gence in another respect.

l was said about the age of the plaintiff ex-
 onduct. But the jury have given no effect to
 tentions in plaintiff's behalf in that respect.
 ey? The things which were done and which
 of the simplest kind. Surely such a child
 s any one can the dangers which he incurred,
 ally and mentally as well able to avoid them
 er able than, most of us.

ort of doubt that the appeal must be dismissed.

d MACLAREN, JJ.A., concurred.

MASTER.

OCTOBER 11TH, 1907.

CHAMBERS.

BROCK v. CRAWFORD.

*Order of Causes of Action—Claim on Guaranty
 Set aside Transfers of Property—Class Suit—
 Amendment—Lis Pendens.*

defendants for an order requiring plaintiffs to
 they will proceed with their claim under a

certain guaranty, or with their alternative claim, and vacating the registry of a certificate of

W. N. Tilley, for defendants.

H. Cassels, K.C., for plaintiffs.

THE MASTER:—The statement of claim is in full effect. The defendants (other than Sutcliffe) transferred to plaintiffs in January last a continuing guaranty for the account of Crawford Bros. Limited, up to \$10,000, that company made an assignment. At that time the plaintiffs over \$17,000. In May the defendants (other than Sutcliffe) transferred to him all the assets and liabilities belonging to them jointly in trust to raise money and pay and satisfy obligations existing with respect to

The statement of claim by way of relief asked is: (1) a declaration that the assignment made by defendants (other than Sutcliffe) of the account of \$10,000; (2) a declaration that they are entitled to that amount on the assets transferred to Sutcliffe and co-defendants; (3) to have such lien realized by the alternative, a declaration that the trust deed is fraudulent and void as against the plaintiffs and creditors of the assignors and to have said trust deed and all transfers made thereunder set aside; (4) an injunction restraining Sutcliffe from dealing in any of the said assets.

The plaintiffs have registered a certificate of title against 4 parcels of real estate in the city of Toronto. • were conveyed to Sutcliffe by his co-defendants.

As soon as the writ was issued the defendants appeared in Court, and submit there is nothing more to be said.

The plaintiffs' action is not formally intitled to a declaration, though relief appropriate thereto is asked.

The statement of claim was delivered on 28th September and the defendants on 7th October instant served a motion requiring plaintiffs to elect whether they would proceed with their claim under the guaranty, or with the alternative, and asking to have the certificate of lis pendens

.

be denied that the statement of claim really rate causes of action, viz.: (1) that of the plain- y under the guaranty; and (2) the claim on be- selves and the other creditors to have the trans- fe set aside.

on, therefore, is, can they be joined under Rule er to do this it was said in *Stroud v. Lawson*, B. 44, that the right to relief must arise from saction and involve a common question of law h conditions must concur. Do they in this ut in the statement of claim?

iffs personally are asking for payment by virtue ty, which is the basis of that claim. Should it o have the effect they contend for, that claim ut, even if this were so, the other branch of ight succeed, as no question of the guaranty a.

s not, therefore, appear any way in which it hat these two entirely different claims arise ne transaction or series of transactions. The be very similar on this point to that of *Bank y. Anderson*, 7 O. L. R. 613, 8 O. L. R. 153, 3 , 389, 709.

will, therefore, go requiring plaintiffs within a d their writ and statement of claim so as to elves to one cause of action. It will not be present, to deal with the question of the cer- pendens, as it would be properly issued in the But the defendants will not be prevented from ion under the Judicature Act, sec. 98, if so ad- is order has been complied with. If the plain- e order now made will provide that they may ended statement of claim, if for any reason ore advantageous to do so.

of the motion will be to the defendants in any

ANGLIN, J.

OCTOBER 12TH, 1907.

WEEKLY COURT.

MCLEOD v. CRAWFORD.

MCLEOD v. LAWSON.

Settlement of Actions—Agreement for Compromise—Summary Application to Enforce—Jurisdiction of High Court—Unperformed Terms of Agreement—Application Made after Final Judgment—No Agreement to Make Terms a Rule of Court—Terms not Included in the Relief Claimed in the Actions—Grounds upon which Motion Resisted—Perjury—Fraud—Concealment—Undue Pressure—Failure of Grounds—Costs of Application.

Motion by plaintiffs, Murdock McLeod and Donald Crawford, for an order or judgment compelling defendant Thomas Crawford to convey to the Lawson Mine Limited, pursuant to an agreement of settlement of 3rd April, 1907, a one-quarter interest in the Lawson mine, to which he remained beneficially entitled after the judgment of the Court of Appeal in these actions.

G. H. Watson, K.C., for the applicants.

S. H. Blake, K.C., for defendant Lawson.

R. McKay, for defendant John McLeod and his committee.

J. B. Holden, for defendant John McMartin.

S. R. Clarke, for defendant Thomas Crawford.

ANGLIN, J.:—These actions were brought to determine the respective interests of the parties to them in a valuable property known as the Lawson Mine.

By judgment at the trial it was determined that Murdock McLeod, Donald Crawford, Thomas Crawford, and John McLeod, were each entitled to an undivided one-quarter interest in the mine, and that Herbert Lawson had certain limited rights as a licensee. In the Court of Appeal this judgment

several interests of the parties other held to have somewhat more extensive than to him by the judgment at the trial. to the Supreme Court of Canada, which it in that Court in March, 1907. After ended for several days, the parties inter- settlement, which they embodied in the

3, 1907. McLeod v. Lawson. Crawford appeals. We agree that all appeals are without costs here or below. We further tion of a company to take over the pro- price of \$5,000,000 in stock of the com- the stock, after providing for working capi- between the parties in proportion to their tained by the judgments of the Court of

ed by "S. R. Clarke, J. McMartin, Thomas lar, R. McKay, counsel for John McLeod, son, by his counsel S. H. Blake, John B. for plaintiffs, and J. McMartin, Geo. W. C. Millar."

ted that the parties do not in terms covenant transfer or convey their respective interests to be formed. But I treat the document as tying such an agreement by those of the sig- ned the property to be taken by the company.

o this agreement judgments were entered in court of Canada dismissing the appeals without ming the judgments of the Court of Appeal

. R. Clarke, Charles Millar, and George W. assignees of portions of the interests of Thomas the property in question, and were for that rea- ties to the agreement of settlement, though not e records in the actions.

April, 1907, an agreement was entered into be- as Crawford, S. R. Clarke, G. W. Bedells, and ar, which recited the terms of the agreement of

settlement, and provided for the division amongst these 4 persons of the shares of stock which should come thereunder to Thomas Crawford. The agreement of 6th April further bound the several parties thereto to facilitate in every way possible the carrying out of the terms of the settlement as agreed to on 3rd April.

Subsequently, at a meeting held at the King Edward hotel, Toronto, attended by Messrs. Crawford, Clarke, Millar, and Bedells, steps were taken for the formation and incorporation of a company pursuant to the agreement of settlement, and it was further arranged that to provide working capital, 5 per cent. of the capital stock of the company should be retained as treasury stock, and not divided amongst the parties interested in the property to be transferred to the company. Neither Mr. Clarke nor Mr. Crawford expressed any dissent from these proceedings, and they were understood to acquiesce therein. Meantime the defendant John McMartin, who had been made a party to the action of McLeod v. Lawson because he held an option to purchase the interests in the property in question which belonged to Donald Crawford, Murdock McLeod, and John McLeod, had, in reliance upon the settlement of 3rd April, paid over to these persons the purchase money under his option, and had become the owner of their interests.

The Lawson Mine Limited having been incorporated with a capital stock of \$5,000,000, as agreed upon, Murdock McLeod, Donald Crawford, and Thomas Harold, as committee of John McLeod, at the request of John McMartin, executed a conveyance to the company of the three-quarters undivided interests awarded to these 3 parties by the judgment of the Court of Appeal. Demand was made upon Thomas Crawford for the conveyance of his one-quarter interest, and a conveyance thereof tendered him for execution. He refused to execute the same or to accept his portion of the shares of the capital stock of the company, as agreed upon at the meeting above mentioned. . . .

In answer to this motion counsel for Thomas Crawford set up that the judgment at the trial was obtained by perjury on the part of Murdock McLeod; that Murdock McLeod and Donald Crawford concealed from Thomas Crawford another discovery in which Thomas Crawford was interested under

their agreement with him, and that, by reason of such fraudulent concealment, Thomas Crawford is entitled to hold as sole beneficial owner the Lawson Mine property, the lease of which had been obtained in his name; that, after the judgment at the trial of these actions, Thomas Crawford obtained in his own name from the Crown a patent in fee of the property in question; that the settlement of 3rd April was brought about by undue pressure upon Mr. S. R. Clarke, one of the parties thereto claiming under Crawford, and was executed by Crawford and Clarke without their fully understanding or appreciating its purport or effect; and that the document itself is vague and uncertain and not susceptible of enforcement by the Court. He further contended that the Lawson Mine Limited were not bound by the agreement made at the King Edward hotel as to the apportionment and division of the stock; that the Court cannot decree specific performance of an agreement to form a company, and therefore should not summarily enforce this agreement of settlement; that the judgments of the Court of Appeal in these actions sustained a collateral attack on the patent of Thomas Crawford, and were, therefore, pronounced without jurisdiction; that the interest of Thomas Crawford in the property was not the subject of litigation in these actions; that one Armstrong had, to the knowledge of all the parties to the settlement of 3rd April, a claim upon the interest of Donald Crawford, and that the settlement, because made without his concurrence, was ineffectual; and, finally, that the conveyance by Murdock McLeod, Donald Crawford, and Thomas Harold to the Lawson Mine Limited amounted to an abandonment of the agreement for settlement, or, if not; that the plaintiffs, Murdock McLeod and Donald Crawford, thereby denuded themselves of all interest in the property, the subject of the litigation, and therefore have no status to maintain the present motion.

The alleged perjury of Murdock McLeod, the alleged fraudulent concealment of an adjacent discovery by Murdock McLeod and Donald Crawford, and the fact that a patent in fee had issued to Thomas Crawford, were all known to Thomas Crawford himself and to those claiming under him before the disposition of this action in the Court of Appeal. The matters in which perjury is said to have been committed by McLeod were fully gone into at the trial. The defendant

Crawford had or could have had the full benefit of Appeal and in the Supreme Court of an adjacent discoveries by his co-adventurers. sued to him was, in fact, made a part of the and was before the Court of Appeal and the With the fullest information as to all the agreement for settlement of 3rd April was executed by Crawford, and also by Messrs. and Bedells, who claim under him. I should be very sorry to see any attempt on the part of the plaintiff in declining to give effect to any objection to the enforcement of this agreement based upon the

Until the meeting at the King Edward hotel, arranged that one-fifth of the capital stock be set aside as working capital, the agreement of the shareholders, perhaps, open to the objection that it was vague and uncertain. But since at that meeting it was decided that one-fifth of the capital to be set aside for working capital was, with the consent of all persons interested, fixed at 5 per cent of the capitalization, and the respective shares of the shareholders in the remainder of the shares were also agreed upon, no objection upon this ground seems to be entertained.

It was argued by counsel that the property covered by the agreement is uncertain, because it does not include or exclude the money realized from the sale of the ore still unsold in which Herbert Lawson has an interest. The dismissal of the appeals to the Supreme Court and the affirmance of the judgments of the Court of Appeals are provided for, make it clear that Lawson has no interest under that judgment, and that this interest is included in the property dealt with by the settlement.

Though the Lawson Mine Limited were not present at the proceedings at the King Edward hotel meeting, the directors, by their resolution, passed after Thomas Crawford had mediated the agreement of settlement, accepting the arrangement done at that meeting, and binding themselves to carry out the arrangement, may not be effective to bind the company, which the company could enforce, or which the directors could enforce against them, the company are willing to be bound by the agreement, and have, by offering to Thomas Crawford the shares to which he would be entitled under the agreement,

enturers, enabled the other parties to perform undertaking which formed the consideration Crawford's promise to them to convey his interpany. It is his co-adventurers, to whom, if of 3rd April is valid, he did bind himself, mpany, who seek to enforce that agreement. any may not be bound seems, therefore, im-

is not asked to decree the formation of a company is already formed, and all the de- tlement of 3rd April have been carried out weyance by Thomas Crawford of the interest y which was left in him by the judgment of appeal.

to Thomas Crawford was not attacked in the e contrary, it was affirmed. All that was have it determined that Thomas Crawford led three-quarters of the property covered by rust for Murdock McLeod, Donald Crawford, eod.

of Thomas Crawford was necessarily the sub- n in these actions. He claimed to be entitled interest to the exclusion of John McLeod, n fee of the entire property issued to him was t the case in appeal. The judgment of the y that Murdock McLeod, Donald Crawford, eod had each a one-quarter interest in the sarily defined the interest of Thomas Craw- other claimant before the Court, as limited

ng has any interest under Donald Crawford, outstanding, and, as to him, the agreement of f course, ineffectual. That, however, is no ould not be binding and effectual as between t, who have all seen fit to proceed upon the t Armstrong had no interest in the property. not represented upon this motion, and his e affected by any disposition made of it.

ances by Murdock McLeod, Donald Crawford, arold to the Lawson Mine Limited, were made

pursuant to and for the purpose of carrying out the settlement of 3rd April, and cannot in any sense be an abandonment by these parties of that agreement. Murdock McLeod and Donald Crawford may have assigned their interests to the Lawson Mine Limited, but their obligation to John McMartin, whose purchase they have obtained, to see that the settlement, in which that money was paid, is carried out, is an obligation and the responsibility in damages which that money was paid, is carried out, is an obligation and the responsibility in damages entail, in my opinion, give them sufficient grounds to maintain the present application.

If I felt at liberty on this motion to discuss the objections to the validity of the agreement, the absence of undue pressure brought to bear upon Mr. Clarke, of independent professional advice on the part of Mr. Clarke and Crawford, and of lack of understanding of the purport and effect of the documents, I should find little difficulty in disposing of the motion. Mr. Clarke is an experienced and shrewd lawyer, and with the assistance of Mr. George Henderson solicitor, and Donald Crawford, himself a business man, had the advice of Mr. Wallace Nesbitt, K.C., and Mr. Eugene Forster in the Supreme Court, at the time the settlement was made. The execution by Messrs. Crawford and Clarke of the subsequent agreement of 6th April, and their acquiescence in the proceedings at the hotel, above referred to, certainly do not tenor their position when infringing the agreement upon these grounds. Since, however, for reasons which I am now about to state, I am of opinion that the Court has no jurisdiction to grant plaintiffs' motion, I will now express further my views upon these matters.

That the Court has jurisdiction, upon matters arising under secs. 9 and 12 of sec. 57 of the Judicature Act, to grant an order of injunction, to enforce an agreement, or promise, of which the validity is admitted, and which none of the terms are dehors the action, is a question which is clear, though in at least one recent case the Court has held that a provision in such an agreement that it should be subject to the order of Court or should become an order or judgment of Court, was the reason assigned by an employer for holding that there was no jurisdiction to grant an injunction.

or the enforcement of a compromise: *Graves*
L. T. N. S. 420.

examined all the cases referred to by counsel and both in England and in Ontario, in which the force, upon summons or motion, an agreement or promise of an action has been considered. In which the Court has made such an order as the case do the circumstances at all resemble those which have to deal.

Whether with justification or not, counsel for Crawford contests the validity of the agreement for Mr. Clarke says that it is not binding upon him because the agreement deals with matters which would not be the subject of any judgment pronounced upon or involved in the actions. Looking at the agreement it is manifest that all that the parties contemplated to be made the subject of a judgment is contained in the sentence—"We agree that all appeals are to be made without costs here or below." Thus far the agreement is in conformity with the prosecution of the litigation and with the character of that litigation; the rest of the agreement, relating to the formation of a company and the division of its stock among the interested parties, is quite foreign to the records in the actions. Notwithstanding there is no provision in the agreement that its terms shall become a rule of Court, or shall take the form of an order or of the Court, but the very form of the agreement itself, which appears to distinctly separate the terms to be embodied in the judgment from the other terms, indicates an intention that as to such other matters the parties were content to rely upon whatever rights the law might give them, apart from any judgment in the pending actions. If it had been intended otherwise, some effort would have been made to have the latter embodied in the judgment of the Court of Canada dismissing the appeals. That the Court has done so affords strong presumptive evidence that it was intended that these terms of the agreement should be enforced by a judgment in the pending actions.

See *Scully v. Lord Dundonald*, 8 Ch. D. 658;
White Lead Syndicate v. McIvor's Patents.

7 Times L. R. 599; *Turner v. Green*, [1] Baker v. Blaker, 55 L. T. 725; *Hakes v. Ho* 1877, unreported, referred to in *Eden v. Naish*.

Eden v. Naish, 7 Ch. D. 781, is the one in which the Court appears to have dealt upon questions raised as to the validity of an agreement, promise, and to have enforced an agreement summarily notwithstanding such objections. It was found, upon examinations of the parties and the evidence, that there were no circumstances which entitled the defendant to resist its performance, and upon which the validity of the agreement was not well founded. The agreement provided that it should be made a rule of the Court. This decision is, perhaps, inconsistent with that in *Graves v. Graves*, supra, from which *Eden v. Naish* is distinguished because, in the latter case, the dissolution of partnership had been pronounced and the order directed to take accounts, pending which the agreement was effected, whereas in *Graves v. Graves* it had been discontinued. The compromise in *Naish*, moreover, was confined to an admission of the matters involved in the reference under which it was made. That in *Graves v. Graves* went beyond this. Neither does the course taken by Hall, J., in *v. Naish*, seem to be in entire harmony with that in *Fry, J.*, as expressed in *In re Gaudet Frères*, 10 Ch. D. 882, at p. 885. He directed that a compromise should stand over until the validity of the agreement, which was denied by the defendant, could be ascertained, saying: "It is not alleged that there is any question of fraud or misrepresentation. I may be that I should not be able to dispose of the matter on this summons. But, if there is no such question at all as to the validity of the compromise, it appears to me that I can dispose of the whole of the summons. The summons must, however, stand against Leslie to make out, if he can, his case against the validity of the agreement."

Neither in *In re Gaudet Frères* S. S. C. 100 v. *Naish* did the terms of the compromise go beyond those in issue upon the record, the

on v. Grand Trunk R. W. Co., however, at p. 100, says that where something has been done under which renders it impossible to proceed with the action without first getting rid of the settlement, an action to try the question of its validity seems

necessary. The judgment entered in the seems to place the applicants in this difficult

In *Pirung v. Dawson*, 9 O. L. R. 248, 4 the terms of the settlement were clearly confirmed in controversy in the action, and no judgment entered. The judgment of Meredith, C.J., that he intended his decision to cover only the motion might be regarded as analogous judgment on the pleadings.

In *Rees v. Carruthers*, *ubi supra*, the C. 52, uses language which seems clearly indicating that the jurisdiction to enforce summarily be confined to compromises of which no term what is in controversy in the action. The decision *son v. Merritt Wood and Pulp Co.*, 18 P. L. R. 1, consistent with this view. . . .

[Reference to *Pryer v. Gribble*, L. R. 10 Ch. 52; *tain v. Rossiter*, 11 Q. B. D. 123, 131; *Leggott v. B. D. 287.*]

The Court of Chancery had not jurisdiction to make an agreement for compromise involving matters those appearing on the record in the cause *Millington*, 9 Hare 65; *King v. Pinsonneau*, C. 245, 258; and judgment of Malins, V.-C., in *Rees v. Carruthers*, L. R. 10 Ch. at p. 537.

Sub-section 9 of sec. 57 of the Ontario Act merely enables the Court to give effect in equity to equitable rights asserted by the parties, which may have been grounds for restraining proceedings or injunction; it further affirms the jurisdiction to stay proceedings in any action upon summary judgment on just and equitable grounds. The jurisdiction affirmed by this sub-section does not rest upon motion, by which it is not sought to restrain the course of any proceedings. Under sub-sec. 12—the provision invoked by the applicants—the Court is authorized and empowered in every cause or matter pending to grant such remedies as any of the parties is entitled to “in respect of any and every legal claim properly brought forward by them respec-

ter." The limitation imposed by the words excludes, in my opinion, from the purview of such extraneous matters as the parties have in latter portion of the agreement of 3rd April,

may be—and I think it is—most regrettable objections apparently unfounded and devoid of parties opposing the present motion should be other persons interested to the expense, trouble of a fresh action to enforce their agreement, reason why the Court should assume a jurisdiction however advantageous and desirable to enable a speedy and effective justice in such a case as that—in other cases it might be found embarrassing—did not exist before the Judicature Act, not, I think, conferred by that enactment.

In my opinion, I have not jurisdiction, upon this sum after final judgment has been entered in the Court to pronounce a judgment or order for the enforcement of unperformed terms of this compromise (the terms which is denied)—terms not covered by such final judgment in which the parties have not agreed, and apart from which, should be made a rule or judgment in these actions—and, above all, terms which are added in the relief claimed in the actions themselves not such as are "within the ordinary range of such an action," and in enforcing which the Court is to adjudicate upon equities distinct from those upon the records."

The application must, therefore, be refused.

As the costs incurred upon this application have been largely increased by issues raised by defendant upon which he entirely fails, I do not think it right to make an order for costs.

ANGLIN, J.

OCTOBER

WEEKLY COURT.

LAWSON v. CRAWFORD.

Injunction—Interim Order—Contract—Prima

Motion by plaintiffs for an interim injunction defendant from interfering with the operations of the plaintiffs in respect of the mining properties in question. *McLeod v. Crawford* and *McLeod v. Lawson*, subsequent to the agreement of 3rd April, 1907, see the opinion in those cases.

G. H. Watson, K.C., for plaintiffs.

S. R. Clarke, for defendant.

ANGLIN, J.:—The agreement of 3rd April, 1907, is *facie* binding upon defendant. Having regard to the circumstances disclosed in the evidence upon which it seems to me improbable that he can, upon the ground on which he impugns the validity and efficacy of the agreement, eventually succeed in obtaining relief from my opinion in *McLeod v. Crawford* and *McLeod v. Lawson* (*supra*.)

If the agreement is good, the defendant, though he has the legal title to it, has no beneficial interest in it in question. Until he has been relieved from the agreement, he should not, I think, be permitted to interfere with or hinder the operations of the plaintiffs.

The injunction will be continued to the date of the motion will be costs in the cause.

OCTOBER 12TH, 1907.

DIVISIONAL COURT.

ALLAN v. PLACE.

*Divisional Court—County Court Appeal—Time—
of Judgment Appealed against—Date of Notifi-
Parties.*

y plaintiff to quash an appeal by defendant from
t of the County Court of Welland upon an in-
ssue, on the ground that the appeal was not
r the first sittings of a Divisional Court com-
ter the expiration of one month from the judg-
or decision complained of," as prescribed by
e County Courts Act, R. S. O. 1897 ch. 55.

lmer, for plaintiff.

y, for defendant.

ment of the Court (MULOCK, C.J., ANGLIN, J.,
was delivered by

J.:—The interpleader issue was tried in the
t in June, and judgment was reserved, no date
or its delivery. Subsequently the County Court
d the record to the clerk of the Court, with an
of his findings, dated 17th July, 1907.

erial does not disclose upon what day the Judge
ord so indorsed to the clerk, but it was stated
this occurred on the 12th or 13th September
events, the clerk first notified defendant's soli-
judgment on 13th September, and they were un-
ware that any judgment had been pronounced.
eal was served on 23rd September, and the ap-
y set down for the October sittings of the Divi-

s v. Swayzie, 31 O. R. 256, Armour, C.J. de-
judgment of a Divisional Court, said obiter,
discussing sec. 57 of the County Courts Act:

"If the judicial opinion or decision, oral or written, pronounced or delivered in open Court, then said to be pronounced or delivered until the notified of it."

With great respect, I may be permitted to take a common sense view of the law commends itself to my judgment.

Motion dismissed with costs to defendant of the appeal.

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TORONTO, OCTOBER 24, 1907.

No. 22

OCTOBER 15TH, 1907.

DIVISIONAL COURT.

FALLIS v. WILSON.

*ent Conveyance—Ante-nuptial Marriage Settlement
tion by Execution Creditor to Set aside—Fraudulent
t of Settlor—Knowledge of Intended Wife of Claim
Execution Creditor—Bona Fides—Absence of Know-
of Fraudulent Purpose—Letter of Intended Wife
anding Settlement.*

al by plaintiff from judgment of MABEE, J., ante

. Davis, for plaintiff.

Holman, K.C., for defendants Alice Emily Wilson
trustees.

COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL,
passed the appeal with costs.

IGHT, MASTER.

OCTOBER 16TH, 1907.

CHAMBERS.

MOUNTJOY v. SAMELLS.

*—Statement of Claim—Undue Extension of Indorse-
of Writ of Summons—Inconsistent Cause of Action
tion to Set aside Will—Contract of Testator with
—Property Wrongfully Obtained from Testator in
Lifetime—Amendment.*

en by some of the defendants to strike out part of
ment of claim.

X. O. W. R. NO. 22—42+

H. E. Rose, for the applicants.

W. E. Middleton, for the other adult defendants.

M. C. Cameron, for the infant defendant.

S. H. Bradford and W. H. Harris, Plaintiffs.

THE MASTER:—The plaintiff in her writ asked only to have the last will and testament of John Samells, dated 8th October, 1906, declared null and void, as well as all preceding wills of said John Samells. In her statement of claim she makes two additional allegations. The first is that her father, the said John Samells, promised that if she would work for him as a domestic, and required her services, he would give her an equal share of his brothers and sisters of his property at his death. She alleges that she performed the work as requested, and is therefore entitled to such equal share.

The will is not produced. It may be alleged that the allegation is correct, that it only gave her a small share. The value of the estate is probably about \$25,000. The plaintiff is one of 7 children of the deceased. The defendant alleges that defendant John Samells jr., was named as executor, after the making of the will of 8th October, 1906, was the day before the testator's death, by which will he procured from his father certain notes of the said father, to a large amount, so depleting the estate.

Some of the defendants are moving against the plaintiff's claim, on the grounds: (1) that these allegations are an undue extension of the indorsement of the writ; (2) that in any case they are causes of action which cannot be united with each other, or with the claim of the plaintiff on the writ.

If the claim to have it declared that the deceased died intestate, for want of testamentary capacity, is established, the Court will order administration.

Until this initial question has been decided, the two claims cannot be prosecuted.

The first can only be usefully made against the estate if the will is established. If the wills are established, the plaintiff would share equally with her brothers and sisters on the intestacy, and her claim would be satisfied. At any rate, it can only be made against the estate if the deceased had appointed personal representative of the deceased.

says there is none, as the letters probate should
and all previous wills set aside.

claim is not one that she herself can make
It must be made by the personal representa-
tate, as in him alone would the right of such
vested. See *Fairfield v. Ross*, 4 O. L. R. 534,
31. At present it is, therefore, doubly objec-

there is a duly qualified representative or
s, they refuse to take action in regard to
ged to have been fraudulently obtained from
the plaintiff will not be without remedy, as she
against the executors or administrators for a
perhaps they would assign the claim to her and
prosecute it if she thought it worth while to
not necessary, in the view I have taken, to con-
or not the statement of claim in the above
undue extension of the indorsement, nor the
of the defendants not having appeared, and
having been served with the statement of
quite clear that for the foregoing reasons the
jected to should be struck out and the prayer
ended accordingly.

If these motions will be to the defendants in the
plaintiff so prefers, she may amend the state-
otherwise as she may be advised; as, e.g., by
claim to an equal share of the estate under the
ct with the deceased, and abandon the claims
letters probate set aside and the deceased de-
died intestate.

MASTER.

OCTOBER 16TH, 1907.

CHAMBERS.

PIPER v. ULREY.

*Statement of Claim—Embarrassment—Multifari-
ousness—Irrelevancy—Pleading Evidence.*

defendants Ulrey and Marskey to strike out
graphs of the statement of claim as being em-
d a similar motion by defendant Barber.

A. B. Morine, for defendants Ulrey and

G. B. Strathy, for defendant Barber.

E. Gillies, for defendants Lennox and B

Casey Wood, for plaintiffs.

THE MASTER:—After reading through the claim as now amended, and considering the counsel, I am of opinion that it should not go with. The basis of the action is the alleged paragraph that "the plaintiffs and the defendants Ulrey and Marskey agreed to join together as a syndicate for the purchase or acquisition of options or mining rights in the Larder Lake district, the said parties to be interested in the said syndicate." Then follows a statement of what was done by these two defendants in pursuance of the agreement, which resulted in the formation of a syndicate of which the defendants Lennox were two of the members; how that certain localities were sold to the syndicate for \$126,000 cash and 1,100,000 of the shares of the company, as fully paid up, and that plaintiffs Ulrey and Marskey took a share in these transactions. There are also statements that these two defendants, Ulrey and Marskey, gave to the defendants Lennox, Ryerson, Barber and others, without consideration, and that shares were taken by them all with knowledge on their parts of the matters hereinbefore set forth, and with notice of the rights. Barber is also made a defendant, on the ground that Ulrey and Marskey, or the directors, of the company, gave him, as managing director of the company, an option for 8 months (from 11th March 1900) on 800,000 shares at 25 cents a share, and that he gave 194,319 shares on condition of his shares, and that he might make on the 800,000 shares with Ulrey and Marskey, in which profits plaintiffs claim to share.

In view of the case of *Evans v. Jaffray*, it does not seem that this statement of claim is multifarious.

The plaintiffs claim to be entitled to a share of all these shares and of the moneys realized on the sale of Marskey. Therefore, all the present defendants must necessarily be before the Court if the plaintiffs are to get the relief asked for.

is based on partnership, and the defendants are charged with violating the known plaintiffs, and the other defendants are alleged with them and aiding them in what the plaintiff truly or not cannot now be inquired into) scheme to deprive plaintiffs of their rights.

ment of claim is longer than usual, but it is objectionable on that account. If any of are irrelevant in defendants' view, they can them alone. *Blake v. Albion Life Insurance Co.* 94, compared with the previous decision in found in 35 L. T. 269 and 45 L. J. C. P. 663, dangerous it is to strike out matters as being, all, only evidence, which are afterwards found ons of some of the material facts on which a eds. See too *Millington v. Loring*, 6 Q. B.

ons against the statement of claim are dis- in cause to plaintiffs.

s should plead in a week. . . .

a similar case of *Lee v. Meehan*, 17th March, orted, affirmed on appeal by Meredith, C.J., ee Chambers book, No. 27, p. 134.

OCTOBER 18TH, 1907.

CHAMBERS.

CLISDELL v. LOVELL.

Striking out—Separate Sittings for Jury and Non-jury Cases—Practice.

defendants Lovell, McKenzie, and the Domin- Co., for an order striking out the jury notice ed by plaintiffs.

ake, K.C., for the applicants.

K.C., for defendants Case and the Case Co.

on, for defendant Millar.

ey, for plaintiffs.

W. R. NO. 22—42a

BRITTON, J.:—The plaintiffs claim, inter alia, that an agreement between the defendant Lovell and the Dominion Brewery Co., dated 13th February, 1907, for the sale and transfer of the brewery property therein described, should be set aside as fraudulent and void as against plaintiffs, and that plaintiffs be declared to be entitled to a one-eighth share each in said property, etc., etc.

Looking at the pleadings, and reading the judgment of Riddell, J. (ante 203), upon a motion to compel answers by some of the defendants upon examination for discovery, and considering all that was urged by counsel upon the argument, I am unhesitatingly of the opinion that the issues herein should be tried without a jury. In any view of the case, I cannot think that a Judge in dealing with any of the alternative claims of the plaintiffs would be assisted by attempting to get the findings of a jury upon the issues of fact.

It is plainly a case in which a Judge at the trial, unless for some special reason to the contrary, not now appearing, would strike out the jury notice. That being so, and as the venue is laid in Toronto, I must follow *Montgomery v. Ryan*, 13 O. L. R. 297, 8 O. W. R. 855. This case is expressly in point.

Order to go striking out jury notice. Costs in the cause.

RIDDELL, J.

OCTOBER 18TH, 1907.

TRIAL.

HUNTON v. COLEMAN CO.

Contract—Work and Labour—Construction—Rate of Payment—"Clear" — Wages — Waiver — Counterclaim—Damages—Reference—Costs.

Action to recover a balance of the contract price for work done by plaintiff for defendants. Counterclaim for damages.

S. A. Jones, for plaintiff.

A. G. Slaght, for defendants.

RIDDELL, J.:—I find as fact that the plaintiff had agreed with the manager of the defendant company to sink two shafts straight down 5 ft. x 7 ft. clear and 50 ft. deep. for \$25 per foot: that, upon being shewn the locus of the two

shafts, he refused to go on with them; that then it was agreed that he should sink the other at the same price; and that he was told that a written contract would be prepared and submitted to him by Mr. M., the solicitor and one of the directors of the company.

By mistake the contract was drawn up at \$30 per foot, and upon this being shewn to the plaintiff, he attempted to bribe the manager of the company to accede to the increased price, but the manager refused. The plaintiff then took the document and signed it and handed it to the solicitor of the company. The document was never executed by the company, and never was accepted by the company or by any one authorized by the company—the manager insisted that the terms were \$25 per foot, and at no time was there any agreement to pay any larger sum.

The plaintiff went on and sank one shaft to the required depth, and at all points in the shaft there was a clear opening of 5 ft. x 7 ft., that is, speaking mathematically, a right parallelogram could at any point be described within the shaft without cutting the sides. The shaft was not straight, however, but, following the vein, it curved around, forming what was called a "belly."

The plaintiff claims the balance of the sum of \$1,500, being for 50 feet at \$30 per foot. The defendants assert that the price should be \$1,250, and that they are entitled to damages for the cost of cutting away the "belly."

The plaintiff's claim, I think, cannot succeed—he knew that the defendants were not willing to pay more than \$25 per foot, and he cannot now insist upon being paid more.

In *Moore v. Maxwell*, 2 C. & K. 554, a supercargo had sailed to Colobar in charge of ship "A," his commission being 5 per cent. Some time after his departure, his principals despatched another ship "B" to Colobar, with instructions to the supercargo already there to find a cargo for her, and offered him in connection with ship "B" a commission of $2\frac{1}{2}$ per cent. He wrote to his principals rejecting this $2\frac{1}{2}$ per cent. commission, but, notwithstanding this, he proceeded to load "B," thinking that the best course for his principals. It was held that he could recover only $2\frac{1}{2}$ per cent. in respect of the cargo of "B."

The present case is stronger against the plaintiff than the case in 2 C. & K. See also *Cavanagh v. Glendinning*, 10 O. W. R. 475, in the Court of Appeal.

The next and only remaining point is the of the word "clear." On the evidence I find evidence I should have found, that a shaft is "clear" only when, whether vertical, oblique, it could be described (mathematically speaking) parallelopipedon 5 ft. x 7 ft.

A third point I do not think necessary to even on that ground, as at present advised, I think the plaintiff should fail. Whether the contract was or it was a term that the last 25 per cent. of the should not be paid without "production of satisfactory evidence that all wages and material has been paid" after trial there remained some wages unpaid, the time was there or could there be "evidence" had been paid for."

Nothing done by the defendants, in my view, is a waiver. The plaintiff then fails. In respect of counterclaim I am not entirely satisfied with the plaintiff removing the "belly." If both parties agree to that at \$500; but either party may have a reference on its own peril, in which case I shall reserve to myself the question of future costs and further directions. The plaintiff will pay the costs of action and counterclaim including judgment.

With this adjudication, the parties can, now, proceed upon the proper judgment to be drawn up; if any more is spoken to. The parties will have until 31st October to exercise the option to take a reference.

OCTOBER 1901.

DIVISIONAL COURT.

RE HALLIDAY AND CITY OF OTTAWA

Municipal Corporations—Ontario Shops Regulation—Early Closing By-law Affecting Class of Trades—Application for Passing—Application of Members of Council—Computation—Certificate of Clerk of Municipal Corporation—Withdrawal of Names of Applicants—Quashing

Appeal by the city corporation from order of the Divisional Court, J., ante 46, quashing by-law.

Taylor McVeity, Ottawa, for appellants.

J. R. Code, for Halliday.

BY MEREDITH, C.J., MACMAHON, J., TEETZEL,
the appeal with costs.

OCTOBER 19TH, 1907.

TRIAL.

FRETTS v. FRETTS.

*of Land by Father to Son — Mother Joining
to Bar Dower — Absence of Consideration —
Action — Action by Mother against Son for Dower
of Father.*

dower.

Warrington, K.C., for plaintiff.

ter, Belleville, for defendant.

J.:—Plaintiff is the mother of defendant and the late William Ryerson Fretts. The defendant was the owner of considerable real estate, and was desirous of giving to defendant the land composed of some 50 acres, part of lot 19 in the township of Fredericksburg. Defendant and wife did not live on the most harmonious and from all the evidence having been an and overbearing man. In October, 1902, he "commanded" is the better word—his wife, plaintiff, to join in a deed to defendant, their property already mentioned. Without independent, as I think, understanding the effect of what gave way to the urging of her husband, and deed to bar her dower. No consideration was this conveyance, but I think plaintiff was at ing that defendant should have this property. s conclusion upon her own evidence, and add r evidence and that of defendant and his wife the evidence of plaintiff should be accepted. and died in 1906, and in his will appear certain the benefit of his wife. She did not and t these in lieu of her dower, and this action is ower in the land already mentioned. At the ressed her willingness to accept even \$50 a

year from her son, the defendant, but he received a dollar.

I am unable on the evidence to find that defendant did anything to do with procuring the deed, or that it was obtained by fraud, or such pressure as the law would regard as such that it can be called coercion, or that plaintiff did not understand the effect of the deed, or that the deed was void. Therefore, I think plaintiff must fail.

The cases have all been gone into by the Divisional Court in *Jarvis v. Jarvis*, in paragraph 9 O. W. R. 903, and it would serve no useful purpose to go through them again. That case has been considered by the Court of Appeal and stands for judgment, and I think that the appeal can turn upon any point that may arise in the case now under consideration.

"Of the wisdom of the act it is not for the Court to say. That every man"—and I add every woman—"is free to do as he pleases, and is not subject to improper exercise of influence by the judge of for himself." per Van Koughnet, C. J. in *Corrigan*, 15 Gr. 341.

The defendant in this case, as in many other cases, is left to the court of public opinion. The defendant's son who refuses to contribute a dollar to the support of his aged mother, when he has received the benefit of her self-abnegation, and who makes the excuse that he thinks she does not need it, is a case which unfortunately seldom comes before the Courts—and it is not in my power to do more than to refer to it.

There will be no costs.

RIDDELL, J.

OCTOBER 1903.

TRIAL.

WARREN v. MACDONNELL.

Master and Servant — Injury to Servant and Death — Negligence — Railway — Person Workmen's Compensation Act — Res Ipsa

Action to recover damages for the death of plaintiff's son, the defendant, owing to the negligence of defendant.

T. W. McGarry, Renfrew, for plaintiff.

J. E. Jones, for defendant.

LL, J.:—The deceased was an employee of defendant as a railway contractor engaged in the construction of the Temiskaming and Northern Ontario Railway. The work of deceased was simply that of repairing cars. At the time of the accident there was a switch off the main line of the railway, upon which switch cars were placed by the contractor for the purpose of repair. Upon the occasion in question there was more than one car upon this switch, the distance to the switch being but a few feet away from the main line with the main line. The deceased, according to the evidence which the jury must have believed, was in the habit of working under one of these cars. An engine-driver, in charge of the foreman, proceeding slowly at a few miles per hour along the main line, was not intended to go upon the switch, but, by reason of the switch being open, the engine ran in a few feet upon the switch, and the car under which the unfortunate deceased was sustained injuries resulting in his death.

In the trial various grounds of negligence were relied upon by the plaintiff. It was contended: (1) that defendant had a different and more efficient kind of switch; (2) that the foreman or the engine-driver should have blown the whistle or given some other warning of the approach of the engine; and (3) that there should have been a flagman placed upon the car when the deceased was under it to warn the engine-driver upon the engine. The jury (rightly as it seems to me) negatived the first two grounds contended by defendant that the deceased had been warned by the foreman and by one McLeod not to go to the switch, which he was when the accident happened; this the jury believed.

In answer to questions the jury found that the casualty was caused by the negligence of defendant; that such negligence was "by the party or persons who were in A. R. Macdonnell's employ and who were in charge of the yard and tracks, should have seen that the switch was kept closed." Upon the evidence we do not know the name of the person whose name does not appear in the evidence."

It would appear by the evidence that one Stewart, the person already referred to, was in charge of the repair work to that extent at least in charge of the yard. The jury have entirely disbelieved Stewart in one particular, and may have doubted his evidence in this particular

also; and so have said that they "do not upon know the name of the party." However that clear that some one there was who was in charge in the employ of the defendant, and it is not possible that this was the deceased. Such person would be within the meaning of the Workmen's Compensation for sec. 2 (5), a "person in the service of the employer in the charge or control of . . . points . . . railway," and therefore one for whose negligence the employer is liable.

The sub-section has received consideration in many cases. *Cox v. Great Western R. W. Co.*, 9 Q. B. 369; *Gibbs v. Great Western R. W. Co.*, 11 Q. B. 369; *McCord v. Cammell*, [1896] A. C. 57, may be cited as shewing the inclination of the Courts to give a liberal interpretation to the words of the sub-section.

I think, too, that the jury were well justified in finding that the fact that the switch in question was not closed being no explanation as to how the switch had been left open or as to how it was still open at the time of the accident indicated negligence in the person in charge of the switch.

It may very well be that plaintiff might have succeeded upon the principle of *res ipsa loquitur*, as in *Meenie v. Tilsonburg, etc., R. W. Co.*, 5 O. W. R. 286, 955, and cases cited.

There will be judgment for plaintiff for damages found by the jury, viz., \$1,400, and full costs of

THE
ARIO WEEKLY REPORTER

TORONTO, OCTOBER 31, 1907.

No. 23

RIGHT, MASTER.

OCTOBER 21ST, 1907.

CHAMBERS.

LEROUX v. SCHNUPP.

~~Examination of Defendant for Discovery~~

CORRECTION.

p. 612, ante, line 5 should read—
could be described (mathematically speaking) a right ”

for seduction of his daughter.

Examination for discovery defendant admitted the
L.

as then asked:—

“I believe you asked her to marry you? A. I refuse
on the advice of counsel.”

“Did you ask her to marry you before you had con-
sulted with her? A. We refuse to answer the question.”

“The action had been for breach of promise, such a
would have been relevant under Millington v. Lor-

B. D. 190. Here, however, it does not seem ad-

reference to Tullidge v. Wade, 3 Wils, 18.]

“The action under promise of marriage may increase the
in an action for breach of promise; but the con-

X. O. W. R. NO. 23—43

verse does not hold. This is not one of "the" of time and place when and where the trespass took place which properly affect the damages said by Bathurst, J., in *Tullidge v. Wade*.

As defendant has admitted the seduction of plaintiff to consider if there is any need for further examination. I express no opinion, however.

The motion now made will be dismissed with costs to defendant.

BRITTON, J.

OCTOBER

WEEKLY COURT.

UNION TRUST CO. v. O'REILLY

*Mortgage—Sale under Judgment of Court—
Tender Sale—Subsequent Sale by Tender —
Price—Validity of Sale—Special Grounds for
Setting Aside—Irregularities.*

Appeal by infant defendants from the decision of the local Master at Ottawa, dated 24th September, 1906.

F. W. Harcourt, for infants.

G. F. Henderson, Ottawa, for purchaser, *non.*

W. N. Tilley, for plaintiffs, and for the Union Trust Co., execution creditors of Philip O'Reilly.

BRITTON, J.:—The appeal is simply upon the ground that the offer of F. W. McKinnon is insufficient to satisfy the claim, being less than the value equal to the value of the land and premises sold in this action.

Pursuant to the judgment and order for sale the property was offered for sale at auction at the Ottawa at noon on 13th September, 1907.

It was offered subject to all taxes, local rates, street sprinkling, and snow cleaning rates, due thereon after 31st December, 1906, and after the 30th June, 1907, and to a reserve set by the Master, and subject to the conditions of the sale.

as apparently well advertised; there were at
s present; the bidding opened at \$4,000, and
gh 28 bids to \$6,750, which was the highest
d price had been fixed higher than the \$6,750,
ty was withdrawn and the attempted sale

ted sale was conducted by the Master in a
proper manner, and afterwards tenders were
was quite proper. A sale by tender is well
e. On 24th September the trustee, in pre-
ors for the parties, and after notice to the
t, considered the tenders and accepted the
e, namely, that of Frederick W. McKinnon
d declared the property sold to him for that
Kinnon's offer was subject to the same terms
le, and generally which were in force at the
empted sale by auction. The proposed pur-
question, was acting in good faith. There
ling offer on the part of any one to give an
, but, upon the facts before me, it may be
now, persons may be found willing to take
rage security from the plaintiffs, and give the
ther time, and very likely a purchaser could
who would pay something in excess of \$9,060
ty. There is certainly a wide divergence of
valuators who have made affidavits herein.

inion that special grounds must now be es-
ting the validity of the sale, before the bid-
opened. The cases cited in Holmsted &
d., under Rule 732, shew that now the mere
r the ability to get, an increased price is not
nd.

ink special grounds have been shewn. It is,
case after the event, apparent that for some
interested, and would-be purchasers, have not
ssibilities as to the value of the property in
re have not been disclosed here any irregu-
the sale, but, if there were, such mere irregu-
not affect the validity of the sale as against
chaser.

Jelly, 3 O. L. R. 72, supports the purchaser's

must be dismissed, with costs to the plaintiffs
chaser out of proceeds of sale. and the costs
dian out of the equity of redemption.

RIDDELL, J.

OCTOBER

TRIAL COURT.

PATCHING v. RUTHVEN

Will—Charge on Land—Declaratory Judgment of Deed—Removal of Executor—Receiver.

Action for reformation of a deed and charge and for other relief.

O. E. Fleming, Windsor, for plaintiff.

J. H. Rodd, Windsor, for defendant.

RIDDELL, J.:—Plaintiff is the step-father. By the will of the late mother of defendant, the defendant took certain personal and certain real estate, including a hotel and 2 lots of which was built the house in which the plaintiff resided at the time of her death, as did plaintiff's deceased's husband and daughter.

This will gave "to my daughter Elizabeth all my property, real and personal, including the lots . . . provided my husband A. Patching have a home in the house No. 107 at any time he may wish, and I direct my daughter Elizabeth . . . to pay my said husband the sum of \$100 per month, payable monthly, as long as he lives in the real estate now stands in the name of my said daughter, myself, and the above payment to him or her is for his interest therein, which he is to enjoy during his daughter."

The will then proceeds to dispose of the real estate, including the hotel, and devises this to the plaintiff and defendant—and the plaintiff and defendant as executors.

After the death, the plaintiff accepted the will, and conveyed to defendant his interest in the real estate "in consideration of the directions in the will of Patching and \$1." Subsequently an agreement was entered into whereby the parties agreed to a payment of \$100 in lieu of plaintiff's right to reside in the

as he is not satisfied with the manner in which dealing with the property, and asks to have the made of his interest in the property reformed, on that he has a charge upon all the estate l, for the removal of defendant as executor, ion, and for a receiver.

says that the deed was not intended to inter- rights of plaintiff under the will, and repu- re or intention to deprive him of any rights had. She asserts that she has been and is the property prudently.

at once that I find as a fact that the alleged plaintiff are groundless, and that defendant, ore than ordinary business capacity, has been ing the business in a prudent and careful nat, even had the law been that the allega- ff being proved, he would be entitled to re- irely failed.

ondence before action and what took place ake it manifest that this action was really pel the defendant to give some kind of secur- ntiff for the payment of what he calls his m unable to see how he can have any such ty, and it is not specifically asked in the aim.

eclaration sought, it is important to remem- ms have been paid practically as and when e, and that there is no complaint that any er is in arrear. The defendant does not ility to pay these sums, and the only con- n the parties is whether the plaintiff has a e real estate for the payment of these sums. old practice, no such declaration would have plaintiff not having actually sustained dam- Conley, 8 O. R. 549, and cases cited.

which was passed (30th March, 1885), after n consequence of that decision, viz., 48 Vict. nd which is now sec. 57 (5) of the Judicature at "no action or proceeding shall be open the ground that a merely declaratory judg- is sought thereby, and the Court may make tions of right, whether any consequential d be claimed or not."

This section has, in turn, been judicially considered in such cases as *Bunnell v. Gordon*, 20 O. R. 622, 30 O. R. 123; and *Stewart v. Guinness*, 262, 2 O. W. R. 168, 554. Without referring to English cases, which will be found referred to in *Langton*, pp. 49, 50, 51, it seems quite clear that an election will not be made in a case in which the matter is a mere academic one, as it is here.

The defendant does not deny her liability as purchaser or mortgagee of any of the real estate with express notice of the terms of the will. The purchase of the two lots refers specifically to the only title the defendant has to any other estate descended through the will.

If and when there is any default in payment, the plaintiff may exercise all the rights he may have. But until then and until a contest of the plaintiff's claim, if he has no right to a charge on the property, he is not entitled to a declaration; if he has, then he is entitled to such declaration. Moreover, some of the property subject to a mortgage, some of it has been sold, and no payment could be given, in the absence of a mortgagee or purchaser, which would be of any present advantage.

There is no reason for removing the property from an order for administration, and the plaintiff's claim.

The action will be dismissed with costs.

I should add that the evidence of the defendant is to be relied upon in matters of fact.

RIDDELL, J.

OCTOBER

TRIAL.

BEAUDRY v. READ.

Company—General Meeting—Election of Directors—Shareholders Prevented from Voting—Meeting of Directors as Remuneration for Services—By-law Authorizing Directors—Necessity for Passing by Board of Directors—Consideration for Abandonment of Appeal in Previous Action—Directors Lending Money to Company—Legality—Costs.

Action by Beaudry, Thorpe, and others against the Mining Co. and the de facto directors.

and certain declarations as to the acts of the
and shares allotted to them, as appears in the

Wright, Windsor, for plaintiffs.

Ellis, Windsor, for defendants.

J.:—The defendant company is incorporated
Ontario Companies Act, and the other defend-
de facto directors. The plaintiff Thorpe was the
er 14,000 of the shares of the company, but,
n order made in an action brought against him
any, he had been restrained from voting upon
meeting of the company. The action came on
ore Anglin, J., 29th and 30th April, 1907, and
Judge, in a judgment delivered 9th May, 1907
942), found in favour of Thorpe. Then, by a
ted 15th May, 4 of the present plaintiffs (in-
rpe) and another requested Thorpe, who was
the company, to call a general meeting:—
lect directors of the said company in the place
at directors, whose term of office has expired.
mend the by-laws in such manner as the share-
think proper.”
ransact such business as might properly come
annual meeting of the shareholders of the com-

quisition, it was asserted at the trial without
, was got up by Thorpe himself.

n a call for a general meeting of the company
by Thorpe, and the call expressed that the
called pursuant to the said requisition, and
or the transaction of the following business”—
2, and 3 as above.

ing was called for 29th May, and was on that
pears, adjourned till 5th June. No objection
the manner of calling the meeting, nor is it
had it not been for the injunction which it was
ted restraining Thorpe from voting upon his
ould be any complaint.

., having decided in favour of Thorpe, it ap-
e judgment had not been actually taken out by
d at all events notice of appeal had been served.
cidentally that this appeal was dismissed by

a Divisional Court (10 O. W. R. 222), and are pending to the Court of Appeal.

The legal advisers of Thorpe were of the opinion that the interim injunction was still in force against the meeting—it is not necessary for me to say whether that opinion was well-founded.

Thorpe attended the meeting on his own behalf, and proxies for voters, and stated to those persons present that the meeting was illegal, and, after refusing to take the chair himself, and voting against the defendant, he, being nominated to take the chair, left the room.

The election of directors proceeded, which was regular under by-law No. 13 of the company. I contend that Thorpe and those associated with him were not entitled to a majority of the stock, and Thorpe, by venting from voting, it would not be fair to him to stand. I can find no semblance of authority for this contention; and it is without foundation in fact.

If it be the fact that Thorpe could not have applied to the Court for an injunction against the election proceeding, or to have the injunction suspended so far as to allow him to vote at the meeting or to vote thereat. But I cannot think that, having neglected to take the necessary precautions, he can now complain, and this without considering the fact that he it was in truth who called the meeting. Moreover, I fail to see how any other shareholder can now complain. This contention, therefore, fails.

At the meeting, in the absence of Thorpe, the shareholders voted to one Newcombe 2,000 shares, to Hooley 1,400, to McPhail 2,000, to Tisdale 1,000, to Walsh 500, and to Read 500, for services rendered to the company pending and since its incorporation. The resolution does not say so in so many words, but it is plain that this was intended to be and was the case. The directors for services rendered to the company. There is no doubt that all those who were given stock for services rendered had done a great deal of work for the company in the capacity of directors, and I have no doubt that Tisdale had performed valuable legal services. And, if the law permitted, I should gladly have given him a share by the company.

e, directors of a company are not entitled to
 tion in the absence of statutory authority:
 Imperial Gas Co., 3 B. & Ad. 125; Hutton v.
 W. Co., 23 Ch. D. 672. The provision in
 to be found in the Act of 1907, 7 Edw. VII.
 "No by-law for the payment of the president
 shall be valid or acted upon until the same
 is confirmed at a general meeting."

that this means that a by-law for the remunera-
 tion shall first be passed by the board of direc-
 tors thus taking the responsibility of defini-
 ng their claim to payment, and fixing the
 amount—and then this by-law shall be laid be-
 fore the meeting and passed upon by the body of

directors being thus by implication given power to
 make a by-law, the body of shareholders are deprived
 of which otherwise they might have: *Rex v. West*—
L. R. 10 Q. B. 215, 4 B. & C. 781, at p. 799; *Dampson*
v. The Candle Co., 24 W. R. 754; *Stephenson v.*
L. R. 2 Q. B. 691, per Street, J., at p. 696; and see what
The Tramways Co. v. Wilson, 8 Q. B. D. at p.
L. R. 10 Q. B. 695, by Coleridge, C.J.

entirely without importance that such a course
 is pursued—there may be many instances in which
 the board of directors for the time being can-
 ned, while a majority of votes in a general
 meeting and there may be an instance in which a
 director would not take upon himself the responsibility,
 and odium, of openly asking for remuneration,
 but, with more or less shew of reluctance, accept
 of it. I think no complaint can fairly be made if it be
 the provisions of the statute must be lived
 up to with the rigour of the statute applied. . . .

disdale's evidence throughout and in all mat-
 ters. While I do not think (and this with some
 of the allotment of stock to him can stand, this
 cannot be without prejudice to any claim he may
 have for the company for legal or other services, in
 the competent jurisdiction in this or his own land.
 was given to defendants Reese, Hooley, and Me-
 ritt, on condition that they would not appeal
 from the judgment of Anglin. J., 9 O. W. R. 912.

By that judgment it had been ordered that he deliver up 5,000 shares of stock which had been assigned to him by Thorpe, McPhail 5,000 shares, and Reese 5,000 shares, similarly assigned. Reese's appeal was acceded to by 2 of these 3 defendants, Thorpe and McPhail, so that the substance of the claim was that these two were receiving shares in the company for their past services and the abandonment by Reese of his right to appeal. It is clear that the abandonment was not brought to enforce a doubtful right or claim, but for consideration for a promise, and so is the claim, though a disputed claim, even though it ultimately failed. The claim was wholly unfounded: *Callister v. L. R. 5 Q. B. 449*; *Miles v. New Zealand Co.*

I have no grounds for believing that the two to the shares of which they were deprived. The consideration already referred to was not made because they knew that there was no reasonable ground for the claim. I think they were giving up something, and that there was sufficient consideration for the stock they gave up. It is impossible to say what part of the stock was allotted to the abandonment of the right to appeal, and what part to the services, but I think that the consideration made at the general meeting, with these shares, was binding.

I am asked also to make a declaration for the defendants who are directors of the company not to draw money from themselves; and also to declare that they must not use the money of the company for their own selves. It appears that when the company was in liquidation the directors put their hands in their own pockets and advanced money to keep it afloat. I shall make a declaration that that was wrong—if it was illegal, no good to me by my saying so. And I shall not, in advance, declare the directors repaying themselves as they are doing with the funds of the company. If they do so, and if I declare them so to do, an action may then be brought against them.

As against defendants Hooey and McPhail, the action should be dismissed with costs; so far as the declaration as to the powers of directors is concerned, the action will be dismissed with costs as against the defendants; as regards the other claims to the company's funds, costs, as there has been part success on both

TER.

OCTOBER 22ND, 1907.

CHAMBERS.

DOWN v. KENNEDY.

*Sent—Rule 603—Action against Executor
rest on Legacy—Defence in Law.*

Plaintiff for summary judgment under Rule

K.C., for plaintiff.

Defendant, K.C., for defendant.

Plaintiff's Statement:—The particulars indorsed on the writ are substantially for interest at 5 per cent. on £1000 given to plaintiff by her father under his will. The defendant is executor.

Plaintiff's Statement continues:—“I give, devise, and bequeath to her as follows: ‘I give, devise, and bequeath to my daughter Margaret M. Down the sum of \$5,000 to her immediately after my decease.’”

Plaintiff's Statement continues:—“The testator died on 17th February, 1906, and the principal legacy was paid on 9th July, 1907. The plaintiff claims interest between those dates, amounting to £100.”

Defendant's affidavit sets up that interest is only payable for a year after testator's death, and says: “I am, as executor of the estate of my late father, opposed to this action, and I am informed that in law there is a good defence.”

Plaintiff's Statement continues:—“It is alleged that a similar legacy is payable to a grandchild of the testator, and that the same question will arise in the case of the executor of my father's estate.”

He continues: “As the executor of my father's estate I have a right to have this action determined and the issue settled.” He concludes with the answer: “The plaintiff is not entitled to summary judgment in this matter of this kind.” I do not clearly apprehend the force of this affidavit sets up. The law seems well settled since the decision in *Wood v. Penoyre*, 13 Ves.

Williams on Executors, 9th ed., pp. 1290, 1291, the law is recognized that in cases like the present the time

fixed for payment by the testator will govern that where, as here, the legacy is to a child, and other provision, interest will run from the date the legatee is under age, but this rule does not apply to a grandchild. It would not, therefore, follow that the decision in the present case would decide the question of the right of the grandchild to interest.

Mr. McBrady contended that if any question of law raised judgment could not be given except at the instance of a Judge in Court. I was of that opinion in *Canadian Electric Co. v. Tagona Water and Light Co.*, 6 O. W. R. 1055. But in the case of *Grose v. Tagona Water and Light Co.*, 3 O. W. R. 353, Street, J., was of a different case. It would, therefore, follow that I am not bound to consider, as was done in the *Grose* case, if there is a valid defence in law—and let the parties, if dissatisfied, take the matter further, as was done in that case.

If Mr. McBrady is right, it is most desirable that the rule he contends for should be formally declared. An allegation by a defendant that he wishes to raise a question of law shall be a sufficient answer to a motion for judgment under Rule 603. At present I do not see how it can be that any such rule has been laid down, and I think the plaintiff here is entitled to judgment, and should not be required to wait until the defendant is satisfied as to the result. In addition to delay, the plaintiff would also be liable for the solicitor and clients costs if this matter was taken to a Divisional Court.

Judgment will, therefore, issue within a week for costs of interest and costs, unless, in the meantime, the defendant gives notice of appeal from this order.

TEETZEL, J.

OCTOBER 1901

CHAMBERS.

COATES v. THE KING.

Pleading — Amendment — Petition of Right — Crown — Rules of Court — Particulars — Costs — Sale of Treasury Bills and Bonds — Names of Parties

Appeal by the suppliants from order of Master of the Rolls, ante 462. requiring them to give parties

th paragraphs of the petition of right, and from
e Master in Chambers, ante 522, refusing to al-
opliants to amend the 14th paragraph.

oss, for the suppliants.

ars Davidson, for the Crown.

L, J., allowed the appeal from the second order,
t there was power to make the amendment, and
uld be made. In view of the amendment, the
would not be necessary. Costs of both appeals
in the cause.

OCTOBER 22ND, 1907.

TRIAL.

EDE v. CANADA FOUNDRY CO.

LYNN v. CANADA FOUNDRY CO.

*l Servant — Injury to Servant and Consequent
Negligence—Finding of Jury—Inconclusive Ver-
dict—Failure to Establish Cause of Injury—Evidence—
Judicial Action.*

to recover damages for the death of a person
by defendants while engaged in construction work,
alleging that the death was caused by the negli-
gents defendants.

C.:—The plaintiff and one of his witnesses attri-
buted the accident by which the deceased was killed to the
negligence of the defendants in placing the rail taken up for
the purpose of placing the gantry leg in position, but this
theory was not accepted. The rest of the plaintiff's
evidence did not accept. The rest of the plaintiff's
and the defendants' witnesses could not account
for the accident, and the jury at the trial, like the
jury, were unable to place legal liability upon any-
body. They deliberated for more than 4 hours, from 6 to
11 a.m., and put in writing their conclusions, pur-
suant to the request. The finding is as follows: "We be-

lieve there was some neglect of some one in the works, or the car could not have fallen, would award to the plaintiff Ede \$2,700 and Lynn \$500."

The effect of this is, that the verdict proves that damages should be paid by the contractor for the accident occurred in the prosecution of constructing the bridge. But no specific neglect is inculcating the defendants or any of their agents in charge of the work. Therefore plaintiff must prove his case—the onus lay on him—and to be willing to regard the matter as still open for trial—a course which the jury probably contemplated. The foreman said that evidence had been kept, but he does not think the practice would justify such a course. The action has been brought to trial, and plaintiff must prove his case, and so failing the action must stand dismissed: *Farmer v. Grand Trunk R. Co.*, 21 O. R. 299. I speak of the consolidated trials . . . ; both rest upon the same facts and have the same result.

The defendants do not ask for costs.

The evidence said to be kept back refers to the men who were at the bridge who might have been called but it was open to either party to call them. The plaintiff relied on the evidence he had.

OCTOBER

DIVISIONAL COURT.

MCCLELLAN v. POWASSAN LUMBER CO.

*Way—Private Way—Easement—Extinguishment of
Ownership—Revival on Severance—Implication
for Fresh Grant—Land Titles Act.*

Appeal by defendants from judgment of the court at the trial at North Bay, in favour of plaintiff for damages caused to plaintiff's property by defendants blocking up a roadway claimed by plaintiff.

gress from her grist mill property situate on
and for an injunction restraining defendants
ing the obstructions placed by them upon this
ay.

al was heard by BOYD, C., MACLAREN, J.A.,
J.

mour, K.C., and J. McCurry, North Bay, for

w. K.C., for plaintiff.

—As I view the case of the plaintiff, it appears
great hardship, but, however much disposed to
ief can only be given according to law.

regard the fact that the title to the lands in
plaintiff and defendants has been brought un-
Titles Act, R. S. O. 1897 ch. 138, as neces-
w application to the doctrine and principles
e ownership and enjoyment of lands. The Act
et the substantive body of law respecting real
framed with a view (as stated in the title) "to
s and to facilitate the transfer of land." Apart
the law has been definitely settled by Wheel-
ys, 12 Ch. D. 33, and the line of decisions which
ply its rules, that unity of ownership or seisin
guishes all pre-existing easements or private
over one part of the land for the accommoda-
er part. When the whole is in the hands of
ne is proprietor of the soil, and his manner
piece of it or part of it is an incident of owner-
in any sense an easement. To constitute an
re must be some privilege which the owner of
has the enjoyment of in respect of or over the
another. When the ownership of the two tene-
for the same estate in fee, the easement ceases
extinguished, and it can only be revived or
being again by a fresh grant, and then the
is of a new thing: see Goddard on Easements,
3.

ance of the land in respect of which an ease-
over one part for the benefit of the other does
vive the extinguished easement, if the domin-
rst granted and the servient part retained by

the owner who made the severance. Such of the land in question here, and I do not think the provisions of the Land Titles Act as operating result.

Unity of tenure and seisin existed in 1891, when the whole conveyed by transfer in 1891. Howard all the land, excepting out of said tract certain lots then on the plan filed—one of which was lot 4. On that lot stood the grist mill owned by the defendant at that time. The defendant, at that lot, being retained by the owner of the tract, had disposed of the rest of the tract, afterwards in the hands of plaintiff. In the document of transfer of lot 4, there were no words to indicate a right of way over the rest of the land conveyed in the deed, failing which express reservation, I think the implication. Section 26 of the Act does not say anything further, as I read it. True it is that the land a road or means of access for waggon or horse, defined on the ground, leading from the highway to the grist mill over the open space of land fronting between lots 4 and 5, which had been formed by the issue of the patent, and was well defined at the time of unity of ownership and subsisted down to the present day. But this right of way existed when the grist mill and saw mill were in the hands of different holders before 1891, ceased to exist when the saw mill and became extinguished in law. When the deed of 1899 was made, it was not a "subsisting" right of way, though it was marked upon the ground as a right of way, which continued to be used for the benefit of the owner of the whole property afterwards.

That is not, I think, an existing or subsisting right of way such as the statute is intended to conserve. It deals with as an outstanding liability to which the land shall be subject.

The whole matter is in narrow compass, and so to apply the Land Titles Act as to give effect to the right he claims over this disputed road.

I may note that it is not enough to raise a presumption that the way is highly convenient, or of being a way of absolute necessity, when the Act forbids any implication in plaintiff's favor.

present result of the cases which are collected in p. 360, 361.

The appeal should succeed and the action be dismissed with costs.

EN, J.A., for reasons stated in writing, agreed with the majority.

J., dissented, stating his reasons in writing.

OCTOBER 22ND, 1907.

DIVISIONAL COURT.

STACK v. DOWD.

Note—Signing by Wife of Maker after Maturity of Note—Consideration—Agreement not to Sue—Bills of Exchange Act—Release of

plaintiff from the judgment of the junior County Court of Wellington dismissing a motion for a new trial of an action on a promissory note, in which action the Judge had decided in favour of the defendant and dismissed the action.

The case was heard by FALCONBRIDGE, C.J., BRITTON, J.

Mr. Arthur, for plaintiff.

Mr. Dowd, for defendant.

J.:— . . . The plaintiff had had an auction on the 18th December, 1903, at which Maurice Dowd sold articles to the amount of \$163, for which he received a promissory note of that date, at 12 months, signed by one James Stack.

In December, 1904, plaintiff signed with Maurice Dowd a promissory note for \$100 at 3 months. This was an accommodation of Maurice Dowd, and she (plaintiff) was not to be paid. In April, 1904, Maurice Dowd sold all his

stock, including what he had bought from and, leaving the farm on which he had been with his wife, the defendant, to Teeswater and subsequently he went to the North-west.

On 2nd February, 1905, the plaintiff went to see if she could not get the defendant's note, Maurice Dowd having before this time assigned, and being in financial difficulties, is the whole story of what took place, as told by the plaintiff:—

"Before going up I had a note prepared for the amount of both notes, and I asked her to sign it. Rosanna Dowd said that her husband needed the \$100, and she would not be responsible, but she said she would sign the \$163 note. I am sure that was the 2nd February. I signed the note on 3rd February, 1905. Maurice Dowd at this time made an assignment, and was in jail at least so I heard. Just as Rosanna Dowd signed the note, she was complaining that there was too much debt against the land, and I told her that I had received full value, and I had a family of six. I thought they were in duty bound to either give me security for the note. She then signed the note in my presence." She adds that she has proved an assignment of Maurice Dowd upon both notes, i.e., the \$100 and the \$163 notes, and has received \$4 from the proceeds of the \$100 note. This, it seems, is the whole of the transaction in question, as at the time the note was not due.

The learned Judge, in his written memorandum, says that the plaintiff at the trial was prevented by her counsel to say that there was an agreement for an extension of time or for forbearance. He stated positively that there was nothing said to that effect.

For the defendant it is contended, first, that she was a lunatic, and there is no corroboration of the fact that there was no consideration for the promise made in fact made.

I pass over the first point, merely saying that I could not permit the case to go off upon that ground.

The second is the ground upon which the case proceeded, and, after an examination of the facts in the cases, I think he was right.

argument addressed to us for the plaintiff is
 curement by the plaintiff of the signature of
 at to the note was in effect equivalent to an
 ot to sue.

as laid down in Byles on Bills, 15th ed., p. 146:
 g debt due from a third person is a good con-
 r a bill or note payable at a future day." "But,"
 n a note on p. 147, "if the note be payable im-
 is conceived that the pre-existing debt of a
 ld not be a consideration, unless it were taken
 on, or unless credit had been given to the ori-
 at the maker's request." This was cited in
 le, 11 C. B. 172, 87 R. R. 626, and there ap-
 proved.

at came before the Common Pleas Division in
 Kerral, 15 O. R. 460, and it was by that Division
 here after a note is after maturity signed by a
 without any consideration moving directly to
 person or any agreement to extend the time of
 ch third person is not liable thereon.

e that we are not bound by this decision, but,
 mination of the cases and principles upon which
 is founded, I am of opinion that it should be
 his implies a finding that the execution by a
 of a past due note does not imply an agreement

argued that the statute has changed the law as
 a Ryan v. McKerral—I can find no semblance
 or such a contention.

is said that a further contention now to be ad-
 as not raised in the Ryan case. It is argued
 e execution of the note by the defendant, the
 ers were released, and therefore there was con-
 ficient to support the promise. I adopt the
 down in Falconbridge on Banking, etc., p. 583:
 n law a material alteration, by whomsoever made
 ranger, Davidson v. Cooper, 11 M. & W. at 739,
 343), avoided and discharged the bill, except
 party who made or assented to the alteration:
 iller, 4 T. R. 320," etc.

v. Beatty, in our own Court of Appeal, 24 A.
 s that where a promissory note after maturity
 a third party without the privity of the original

makers, the alteration is a material one. It has not since been questioned, and should be so.

The statute R. S. C. 1906 ch. 119, sec. 10, says: "Where a bill or acceptance is materially altered, the assent of all parties liable on the bill, except as against a party who has himself assented to the alteration, and subsequent to the alteration, is null and void."

Not to press the point that there is no alteration was not proved to have been given by the other parties to the note, and therefore it appears the note may still be perfectly good—and passing over the argument that it means that no one who assents to the alteration can say that his rights are interfered with—I shall say a word as to the alleged consideration.

Whatever definition of "consideration" seems clear that anything—I am using the comprehensive term I know of—to be a consideration must be given, done, or suffered at the request, or in pursuance of the promise, of the person making the promise. The Act of 1872 gives the following, which I adopt: "The desire of the promisor, the promisee, or a third person, has done or abstained from doing, or to do, or to abstain from doing, or promises to do or abstain from doing, such act or abstinence or promise is consideration for the promise." And Bowen, L. J., in *Carbolite Smoke Ball Co. v. Mather*, [1893] 1 Q. B. 25, said: "Then as to the alleged want of consideration of 'consideration' given in *Selwyn v. Mather*, 11 Q. B. 47, which is cited and adopted by the court in the case of *Laythorpe v. Bryant*, 3 Scott 238, as an act of the plaintiff from which the defendant derived some benefit or advantage, or any labour, detriment, or disadvantage sustained by the plaintiff, provided such act was such inconvenience suffered by the plaintiff as was express or implied, of the defendant." There is a physical difference between "the desire of the promisor" in the former definition and "the consent of the promisee" in the latter, but in this case at least there is no practical difference. There was a desire on the part of the defendant that the other parties to the note should be released, and, had she been asked, it could have been proved that she would have consented to the release of the

ent might be advanced that, by executing the was asked, she by implication must be taken ed or consented to the legal consequence of n. No doubt, for some purposes every one is w the law, but the law is not so absurd as to ndant: "The law is thus; true, you did not was so, and acted in that ignorance; you must hough you had acted with a full knowledge of he law, and therefore all your intentions, de- sment must be gauged upon that hypothesis, true."

cer, 18 Q. B. D. 290, is a valuable decision in

nothing here indicating any desire or request the part of the defendant that the other parties ould be released, and neither party imagined ld be the result.

while under the rule in *Currie v. Misa*, L. R. under any other definition of "consideration," the makers might be a valid consideration, it the circumstances of this case, such as would romise.

should be dismissed with costs.

JUDGE, C.J., and BRITTON, J., agreed that the be dismissed with costs.

OCTOBER 22ND, 1907.

C. A.

REX v. CAPELLI.

Conviction for Murder—Application for Appeal and to Compel Trial Judge to State a its of Jurisdiction of Court of Appeal—Pro- Criminal Code—Evidence for Jury—Absence of n and of Improper Admission or Rejection of — Two Prisoners Tried together — Witness Back of Indictment not Called by Crown. nor Court—Failure of Crown to Procure Attend- Persons Present at Commission of Act—Pre- application to Executive for New Trial.

prisoner for leave to appeal from his con- under upon a trial before TEETZEL, J., and

a jury, and for a direction to the Judge to for a new trial.

The prisoner was charged with the murder and convicted in June, 1907, at the Parramatta and sentenced to be hanged on 1st August. A reprieve was granted at first until 15th August (1908) and then until 7th November.

The grounds of appeal were that the eye-witnesses was not put in at the trial; that the man who performed the autopsy on Dow, was not put in; his name was indorsed on the indictment; that the fact of stabbing of three others by the prisoner had not been admitted at the trial; and that the prisoner Marano should not have been put on trial.

The motion was heard by Moss, C.J.O., MEREDITH, J.J.A., and ANGLIN, J.

T. C. Robinette, K.C., and C. A. Moss, J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.:—The appellate jurisdiction under the Criminal Code, R. S. C. 1906 Chapter 19, as they were before the revision of the Acts of the Parliament of Canada. The limits of the Court's jurisdiction and the manner in which it was exercised were well settled. No new ground in either respect has been conferred upon the Crown. We cannot entertain a new trial on the ground that the verdict is against the weight of evidence, unless the trial Court has given leave to move for that purpose: sec. 1022. If leave has not been granted, the only remedy of the Crown against the verdict is not open to any objection in law under sec. 1022, by an application to the Court of Appeal. The Crown, upon which the Minister of Justice is relying, is asking His Majesty to remit or commute the sentence and order a new trial, as was done in Regina (1907), 10 Can. Crim. Cas. 1. No authority has been shown to the Court to entertain an application for a new trial on the facts upon affidavits corroborative of the defence or disclosing new evidence. Such an application is for the consideration of the Minister of Justice under section last referred to.

Our jurisdiction is:—

ar any question of law arising either on the
ny of the proceedings preliminary, subsequent,
thereto, or arising out of the direction of the
the trial Court, either during or after the trial,
for our opinion: sec. 1014 (former sec. 743.)

e trial Court refuses to reserve the question,
tion of law, we may hear an application for
al: sec. 1015; and, if leave is granted, may
directed by us to be stated thereon as if the
been reserved: sec. 1016.

018 and 1019 shew that in dealing with the case
directed to be stated the Court considers only
of law.

nce which the Court is empowered to receive
015 (3) and 1017 (2) is such evidence, if any,
the evidence at the trial, as may be necessary
questions of law upon which it is sought to

s no evidence upon which a conviction could
taken place, that of course raises a question of
y be the subject of a reservation or stated case.

ot the case before us. It very plainly appears
s evidence upon which the jury might find the
ty of the more serious offence. Whether they
ed in doing so by the suggestion that he was
o commit a rape upon the woman McCormack
pushed off her by the deceased, we do not know.
o likely that they were, and, no doubt, some of
gave colour to the suggestion. It is, I must
t, a suggestion which ought to have been rejected
s ridiculous and of no weight whatever, under
nces, situated as the parties were in a crowded
nothing of the age of the woman. Everything
tnesses depose to on this point is, I would say,
to be referred to the fact that both parties had
g and had fallen together on the floor while en-
r maudlin horseplay. The sudden rage of the
his instant, though inexcusable, use of his wea-
e deceased's interference, is intelligible upon this
as all, no doubt, for the jury, and can now only
elsewhere.

examination of the evidence and of the charge
ed Judge satisfies me that there was no mis-

direction on his part, and that no evidence admitted or rejected.

The fact that the prisoners were tried in some respects have reflected unfavourably on prisoner Capelli, impossible as it often is for the jury to avoid forming impressions upon both out of evidence applicable to the case alone: *Rex v. Martin*, 9 O. L. R. 218, 5 O. W. R. 101. However, the matter was entirely for the jury under the Judge, and can only be considered elsewhere.

The further objection was raised on behalf of the accused that Dr. Robertson, whose name was on the indictment, but who had not been sworn before the jury, was not called by the Crown and was not examined by the Crown or present in court so that he was not examined or called by the accused. No authority was found and I have found none, to shew that this affects the regularity of the proceedings.

Section 876 of the Code provides that the name of every witness examined or intended to be examined on the bill of indictment, and that the foreman of the jury shall write his initials against the name of every witness sworn and examined upon the bill; and that the name of every witness intended to be examined on the bill must be submitted to the grand jury by the prosecuting officer, and that no others shall be examined on the bill, unless upon the written order of the Judge.

In Archbold's *Crim. Pldg.*, 23rd ed. (1900), it is said: "Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the indictment, it has been usual to do so that the defence may cross-examine them. If the counsel wish to do otherwise, the Judge in his discretion may. . . . The prosecutor is not bound to call them all, though it has been said, to have them in Court that the defence may cross-examine them for the defence if the prisoner chooses." *Ev.*, 12th ed., p. 119, is to the same effect. In *Regina v. Edwards*, 3 Cox C. C. 82, is cited, in support of the view, down that it is in general a matter entirely for the discretion of counsel whether all the witnesses named on the bill should be called on behalf of the Crown.

judge has power to interfere (by calling them will only exercise it in extreme cases.

principles apply to the question which has also point of here, whether in a case like this the have in Court all the witnesses present at the commission of the act, so that the accused may the opportunity of calling them, and of thus jury to draw their own conclusions as to the the matter."

the obligation appears to rest upon the Crown ct, and if the Crown declines to place the wit-, or has not subpoenaed him, the prisoner must out a case for the postponement of the trial. prejudice has been caused to the prisoner by the was pursued in the present instance, that also subject of an application in another quarter. o power to interfere, and the motion for leave stated must, therefore, be refused.

J.A., and ANGLIN, J., each gave reasons in e same conclusion.

O., and GARROW, J.A., agreed in the result.

MASTER.

OCTOBER 23RD, 1907.

CHAMBERS.

ARNOLDI v. COCKBURN.

*empted Examination of Plaintiff in Support
by Defendant for Better Particulars—Refusal
n—Discovery.*

decision of RIDDELL, J., in this case, ante 373, 8th September, 1907, delivered particulars of of claim, covering 13 type-written pages. satisfactory to defendant, who on 7th October, ice of motion for further and better particu- h other order as might seem proper, on grounds

The notice also stated that in support of this

motion would be read "the examination of taken before a special examiner."

On 15th October the plaintiff and counsel defendant attended before a special examiner above examination. Plaintiff declined to ground that this was an attempt to have discovery proper time. Counsel for defendant stated going to examine for discovery, but only whether or not defendant was entitled to particulars. But plaintiff still refused to proceedings ended.

Defendant then moved to dismiss the plaintiff's refusal to be sworn.

F. E. Hodgins, K.C., for defendant, cited *McClennaghan v. Buchan*, 15 P. R. 338; *McClennaghan v. Buchan*.

R. McKay, for plaintiff, cited *Smith v. 47*, 179, and *Dryden v. Smith*, 17 P. R. 50. a party cannot do indirectly what he can *Hopkins v. Smith*, 1 O. L. R. 659, and *Miller R. 330*, as shewing that it was proper to do and so stop in limine an examination if it any case. He also relied on *Beeton v. Gilchrist*, 16 P. R. at p. 286.

THE MASTER:—The cases cited for plaintiff are conclusive if any discovery was being asked. Motion of that kind is disclaimed by Mr. Justice Clark in *Clark v. Campbell*, 15 P. R. 338, it is clear in cases in which a party can be examined cross-examined by his opponent, and I cannot say that that is not the case. What questions will be asked cannot be usefully imagined) beforehand.

Plaintiff must attend and submit to answer the questions are asked which are considered in the motion be dealt with under Rule 455 as practically.

The costs of this motion will be to defendant.

OCTOBER 24TH, 1907.

CHAMBERS.

LOGAN v. DREW.

*— Amendment after Entry — Neglect to Provide
Interlocutory Costs Reserved for the Trial Judge—
Division of Costs.*

by plaintiffs to amend the formal judgment in such a way as to provide for the disposition of an interlocutory motion heard before FALCONER, J., and of the appeal from his decision to a Divisional Court.

provision, for plaintiffs.

provision, for defendants.

Chief Justice, J.:—The motion before the Chief Justice was made by the plaintiff W. I. Logan to have an alleged settlement of the action affirmed, at the assizes there in October, 1906, enforced to the meaning of that settlement put upon it by the Chief Justice.

Defendants opposed the motion, but asserted a settlement of the action to a construction they put upon it, and asked that the settlement be carried out.

The motion was refused. The plaintiff then appealed to a Divisional Court: the appeal was allowed on the extent of setting aside the order of the Chief Justice, and the case was sent down for trial, with liberty to the plaintiff to amend, and to set up any alleged settlement of the matter of defence in the action. The Divisional Court ordered that the costs of the motion and of the appeal should be disposed of by the presiding Judge at the trial. The trial took place before me at Saratoga in the spring of 1907, and I dismissed the action with costs, and counsel omitted to call my attention to the costs of the motion and appeals, reserved for my decision.

In considering the parties, and considering that the plaintiff had made his motion before the Chief Justice, and that the Divisional Court did not affirm any settlement as contended for by either party, and that the issue as to the settlement

raised by the defendants was decided adversely of opinion, and so order, that neither party against the other, any costs of the motion before Justice, or of the appeal to the Divisional Court at the trial of attempting to uphold or to reverse the judgment. The defendants are entitled to the costs of defence in the action, as already ordered, but if they do not agree, it will be for the taxing officer to apportion to either plaintiffs or defendants any costs, so far as they be ascertained, pertaining solely to the appeal, as above stated.

The costs of this motion to be costs in the cause.
Formal judgment to be amended accordingly.

RIDDELL, J.

OCTOBER 1903.

TRIAL.

BECK v. CANADIAN PACIFIC RAILWAY.

Railway—Animals Killed on Track—Negligence—Fence—Lease by Railway Company of Land for Railway—Escape of Horses therefrom—Order to see to Erect and Maintain Fences—Order to Use Lands under License from Assignors—Escape of Animals Due to Negligence—Railway Act, 1903, secs. 199, 237.

Action to recover the value of some horses killed on defendants' railway.

A. B. Morine, for plaintiffs.

W. R. White, K.C., and W. H. Williams, for defendants.

RIDDELL, J.:—At Wahnapiatae, in the County of Huron, Ontario, the defendants, being the owners of a parcel of land adjoining the line of their railway, leased it on 31st March 1900, for 5 years, to one Picard. In the lease there was a proviso as follows: "And the lessee, for himself, his heirs, administrators, and assigns, covenants, promises, and agrees to and with the company, its successors and

those claiming under him as aforesaid will forthwith erect, and at the term hereby mentioned maintain, around the land . . . and that the lessee (and those under him as aforesaid) will forthwith erect, and at the term hereby mentioned maintain, around the land hereby demised, fences suitable and sufficient to enclose the land, and to keep off deer, cattle, and other animals from getting upon the land. The original lessee assigned to the Victoria Harbour Company; the defendants did not in terms assign the land, but they knew that the assignment was made, and have not in any way interfered with the enjoyment of the property by the Victoria Harbour Lum-

ber Co. parcel, by whom or when erected does not appear to be a fence, and separating it for the most part from the land of the plaintiff, is a fence, built by whom or when does not appear. The Victoria Harbour Lumber Co. permitted plain-ly the use of this property, including the stable. On the night of 12th January, 1907, a car load of deer was sent out at defendants' station at Wahnapiatae, and, instead of being put into the stockyard at the station, the deer were taken across the river Wahnapiatae on the ice, and a number of them escaped upon the line of the railway. Five of these were killed upon the line of the railway by the engine of defendants; their value is admitted.

The plaintiff contend that they have a right to compensation, under the statute in their favour; the defendants say that they are bound to fence as against these plaintiffs, and that they are protected by the fact that the animals were killed by the negligence of plaintiffs.

The accident occurred before the coming into force of the Act of 1906, the Act to be looked at is the Railway Act, R.S.C. (Edw. VII. ch. 58).

Section 99 of that statute provides that:

"Every company shall erect and maintain upon the railway fences . . . as follows:

"The fences shall be of a minimum height of 4 feet 6 inches on the railway. . . .

"The fences . . . shall be suitable and sufficient to keep off deer, cattle and other animals from getting on the rail-

An exception is made by sub-sec. 3 of the Act, if proved or settled, not of importance to be proved as, if it be necessary for plaintiffs to negative it, I should allow it to be proved by affidavit.

In the factum for the appellants in *Grand Trunk R. W. Co. v. McKay*, 34 S. C. R. 81, will be found the Canadian legislation in Canada concerning the duty of railway companies to fence, and English, Scottish, and Ontario cases are collected. I do not think it a good purpose to retrace that history and retrace it here—the legislation is, I think, clear.

The obligation is, to "erect and maintain a fence along the way." "Railway" is defined by the Act (section 2) as "property real and personal connected with a railway which the company have authority to operate." A fence built at any place on the railway is property sufficient to keep out cattle, and of that kind would satisfy the statute. There was, before the decision, a duty cast upon the railway company to fence their land, might not get from their own land upon the railway, there was no duty to place a fence along the railway line proper. A lease being made containing a provision that the lessee should himself build a fence—does that thereby create a duty on the railway company to build a fence themselves? I should think the question answers it in the negative.

But the case is not without authority. In *Grand Trunk R. W. Co. v. McKay*, in part reported in 14 O. L. R. 63, and in full in 14 O. L. R. 423, and in full in 14 O. L. R. 63, a majority of the judges held that the owner of land adjacent to a railway track who had agreed to keep up gates, etc., against the railway company for defect in the track, that his tenant was in no better position. Mr. Justice Gauthier points out that the knowledge of the tenant of the defect is immaterial, and that the right of the tenant is higher than that of the landlord, even though the landlord is ignorant of the existence of the agreement. If I were prepared to overrule this decision, I ought to be prepared to overrule the right of a tenant being higher than that of the landlord. I have re-read the cases cited in the *Yeates* report, and I am of the opinion that the decision is right. There is no difference in principle between the relative rights of the tenant and the landlord.

on the one hand, and tenant and assignee on the other. The Harbour Lumber Co. can have no rights those of Picard, and the licensees of the Victoria can have no higher rights than that company.

On that ground the action should be dismissed.

Also the plaintiffs must fail upon another ground. Sec. 237 (4), exempts the company from liability if, in the opinion of the Court or jury trying the case, the horses that an animal got at large through the fault of the owner or his agent. These horses were a lot from Toronto, brought out to Wahnapiatae with halter-allowed to rush out pell-mell into the stockyard, being led out by the halter and tied up to be taken by the plaintiffs' witness Beck said this was not the right method of taking them out of the car. . . . This alone would be sufficient for the plaintiffs. The horses, strange as they were to the country, were most of them allowed to run, 5 or 6 at a time, on the halter, and the remainder following as they could. The method of taking the horses was adopted because the plaintiffs' servants really wanted to keep them out of the car. They did not think there was much danger, and they had a great deal of very much trouble to keep them back.

As a jury, I was allowed by consent of counsel to find that the knowledge of horses acquired on the farm and in the city was sufficient. Sitting as a jury and using my knowledge, beyond question, the method adopted with these horses was a negligent one, and that this negligence was the cause of the animals getting and being at large. The plaintiffs' knowledge or experience, and using common sense, would lead them to think that conclusion would equally be arrived at. The last sentence of sub-sec. 4 does not avoid the force of this finding—that only provides that the mere fact of the animals not being in charge of some competent person does not deprive the owner of his right to recover—unless the fact of the animals not being in charge of some competent person shall not ipso facto be deemed negli-

In view of this, plaintiffs cannot succeed. The action will be dismissed with costs.

RIDDELL, J.

OCTOBER

WEEKLY COURT.

REINHARDT v. JODOUIN.

Costs — Motion for Judgment on Report by Plaintiff — Appeal from Report not Contested — Costs of Motion.

Motion by plaintiffs for judgment on facts and costs.

W. R. Smyth, for plaintiffs.

A. H. Marsh, K.C., for defendant.

RIDDELL, J.:—This action was tried before me at Toronto non-jury sittings in February last. I gave judgment declaring that the defendant was liable to pay for certain supplies received by him, and appointing Mr. Cartwright (an official referee) to take the account between the parties upon the basis of my judgment.

The referee has made a report, dated September 1st, in which he finds that the defendant is indebted to the plaintiffs in the sum of \$855.25. By Rule 649 of the Rules of Practice, a report of a referee is to be treated as a report of a Master, and the report becomes absolute at the expiration of 14 days after the date of serving of notice of filing the same. The report as requires confirmation, and the motion for judgment upon the report should not have been made until after confirmation. Further directions and all questions of law having been reserved at the trial, the plaintiff's motion was made on the 21st instant, before my brother Britton, and the motion was referred to me by that judge. The matter came on before me on the 22nd instant. Mr. Marsh took the objection that the motion was premature, but said that this position was taken only to save costs, and that the defendant should get the costs of this motion; and that the motion should be argued upon the merits. I disposed of all matters in dispute by argument except the question of the costs of the motion.

The legal position is that if the defendant had taken the objection upon his objection, he would be entitled to

, and I suppose with costs—then the plaintiffs entitled, after waiting a few days (it being admitted there is no intention to appeal from the report), we; and they would be entitled to the costs of that the result would be the same (except to the solicitor as though I should now direct that there be costs of this motion. The Court must consider of litigants alone, and motions or objections for costs only are not to be encouraged.

will be judgment for the plaintiffs for the sum of interest thereon from the teste of the writ, and costs on and reference, but there will be no costs of the motion.

OCTOBER 26TH, 1907.

DIVISIONAL COURT.

MEOD AND TAY (No. 11) SCHOOL TRUSTEES.

Schools—Rural School Section—Acquisition of Site—Providing New School House—Award—Opposition—Selected — Meeting of Ratepayers — Refusal to Issue of Debentures — Mandamus — Public Act, 1901, sec. 74—" May"—Mandamus to Trustee to Change Site—Amendments to Act—Disinterference of Court.

by McLeod and Morris, the applicants, from an order of JETZEL, J., dismissing an application for an order of a mandamus commanding the respondents to purchase or acquire certain property for a school and immediately to build or otherwise acquire a school house upon the site.

for the appellants.

for the respondents.

gment of the Court (FALCONBRIDGE, C.J., BRITTON, J.), was delivered by

BRITTON, J.:—The applicants are qu of school section No. 11 in the township of a school house in this section located upon concession. This was destroyed by fire 1905. Then proceedings were taken by ratepayers for changing the site for the that section, and, arbitrators having been award was made on 5th May, 1906, changing east corner of lot 1 in the same concession

There was no request to the arbitrators their award, and no proceedings have been that award, so it became, under sub-sec. 3 Public Schools Act, 1901, binding upon years from its date.

There is very little of fact in controversy parties. The applicant McLeod says that of the award a majority of the trustees opposed to the site selected and fixed by he believes that a majority of the ratepayers section are likewise opposed to the said site

After the fire, no school was open in about 1st June last, when the trustees located not in the township, but just across the township the adjoining township of Medonte. The trustees is not complained of as illegal—or not be dealt with on the present application and others pressed upon the trustees the duty of ratepayers considered it, of erecting a school house on the site, and on 16th June, 1906, a meeting of ratepayers held for the purpose of considering the matter. At the meeting the trustees resolved to ask the ratepayers for sanction the issuing of debentures and the raising of money

The meeting of ratepayers was held on 19th June and they, by a vote of 19 for and 28 against, sanctioned the issue of debentures. A great discussion followed. The trustees . . . in 1907 attempted to meet the serious difficulties arisen by suggesting two sites, and building two school houses.

A special meeting was called for 25th June for the double purpose of deciding whether the trustees should build two school houses, and whether the raising of debentures would be sanctioned. At that meeting

, so far as those at the meeting could do so, to the erection of two school houses. The vote on two school sites and houses was 28, and 20 were against, and the vote in favour of raising \$2,000 by a rate of 27 for and 20 against. This decision was set aside, because the proceedings were declared illegal by the school inspector. Then the trustees attempted to obtain a writ by an application to the County Court, but this resulted from this.

The trustees then met, and a special meeting of the trustees was held on 11th May, 1907, to consider the matter of a levy of \$1,500 for the erection of a school house on a new site and for school furniture. At this meeting the vote was 28 in favour of the levy and none in favour of it. It is contended that there is no authority for calling a meeting for the purpose of raising a rate, and I agree that such a meeting is not authorized by the School Act, but the proceedings of the trustees shew that they have acted in perfect good faith in attempting to provide, on terms not onerous, for the accommodation for children in the district.

It is contended that the applicants and some others, but not all the ratepayers of the section, are willing to pay the levy for the new school house upon the award of the trustees for the necessary school furniture; but is this a sufficient reason for the Court should grant a mandamus to compel the trustees to ask for a large sum of money to be paid by the ratepayers in one year? It is conceded that the rate cannot be raised by debentures extending beyond one year without the necessary sanction by the ratepayers, as required by the Public Schools Act, 1901, has not been obtained. In doubt, the word "may" does not necessarily imply discretion—it sometimes is obligatory.

The strongest cases for the applicants' contention that the Court is not able to find are *Julius v. Bishop of Oxford*, 12 Q.B. 214, and *Regina v. Tithe Commissioners*, 14 Q.B. 1. The latter of these cases decides "that in public law only directory, promissory, or enabling, may be enforced by compulsory force when the thing to be done is for the benefit or in advancement of public justice. This rule, in my opinion, come within that rule. It is, in my opinion, be an injustice to compel the ratepayers of a township to pay the whole amount in one year. It seems to be clear that the majority in number at

least of the ratepayers in the section are the award site. I am of opinion that there change the site before the erection of a school. Two of the amendments to the Public Schools Act are important in this connection. . . .

[Reference to 4 Edw. VII. ch. 30, sec. 23, and 34 of the principal Act by adding a new section 34 to 6 Edw. VII. ch. 53, sec. 22, repealing section 34 of the principal Act and substituting a new section 34.]

As the law stood in 1901, the power of the trustees to change the site was limited to the then sub-sec. 1 of sec. 34 was limited to the power to erect a new school house, or to agreeing upon a new site for an existing school house.

Under the amended Act, if the trustees refuse to change the site, the ratepayers, can, even after accepting the award, change it and select a new one, they should be compelled to erect a school house upon that site.

The mandamus asked for would not be granted as a remedy of the trouble of which the majority of the ratepayers are complaining.

In conclusion, I am of opinion that the duty cast upon the trustees to ask for a new site, and to proceed to build upon that site, is a single levy, and to proceed to build upon that site by the award. The trustees have considered the matter and have come to a conclusion. I am of opinion that that conclusion is an erroneous one, and that, if the discretion was theirs to exercise, if the discretion was theirs to exercise judgment, the Court ought not to interfere. The decision of the Chancellor in Wallace v. Township of Wallace, R. at p. 656, is applicable. . . .

Appeal dismissed with costs.

Ex. 10
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THE
MARIO WEEKLY REPORTER

TORONTO, NOVEMBER 7, 1907.

No. 24

, J.

MAY 28TH, 1907.

TRIAL.

BOUCK v. CLARK.

*Goods — Absence of Express Warranty — Implied
Warranty — Quality of Hay — Opportunity for Inspec-
tion — Acceptance — Estoppel — Division Court Judge
— Evidence as to Opinion of Quality.*

for breach of warranty of the quality of hay pur-
chased by plaintiff from defendant.

Pringle, Cornwall, and J. A. C. Cameron, Corn-
wall, plaintiff.

Liard, Morrisburg, and C. H. Cline, Cornwall, for
defendant.

IRON, J.:—The plaintiff is a dealer in hay and feed,
business in the village of Winchester, and the defend-
ant is a farmer residing in the township of Matilda. The
plaintiff bought the defendant in the autumn of 1906, and
purchased all the hay that defendant then had. It
is in the statement of claim that the hay so purchased
was good merchantable hay and of No. 1 quality. In
evidence the plaintiff said the hay was to be good green
hay and was saved.

The main facts are hardly open to question. The de-
fendant represented that he had, in the autumn of 1906,
100 tons of hay. It was in 3 barns of the defendant,
the plaintiff visited two of these barns, viz., the south-
east and the south-east barn—he did not go to the north
barn to see the hay therein, at the time he agreed to pur-

The defendant commenced to deliver in and the hay, with the exception of a certain quantity, was delivered to the plaintiff and inspected by him, so far as hay pressed and be inspected. The plaintiff had the right to reject if the hay was not such as plaintiff and he exercised that right in at least one to a small quantity of hay. Upon the evidence impossible to find that there was any fraud on the defendant, either by concealment or misrepresentation. It is conceded that there was no express warranty on the whole evidence I am of opinion that the plaintiff complied with the warranty. It is no fault of defendant that he did not make a more full and careful examination of the hay. The plaintiff could have seen the hay as it was delivered, and when it was being delivered, if the plaintiff was not satisfied with the outside of the bales, he could have opened such as he suspected, if any, or such and so on, to enable him to see the average quality of the hay. The plaintiff did open one bale under suspicion and found it was good. It is in evidence, and I accept it as proved, that it is difficult, if not impossible, in the ordinary course of business, to mix any considerable quantity of bad hay with good in such a way that the bad cannot be detected without opening the bales. Apart from the ordinary means of detecting musty hay, discolouration of the hay itself, and weeds, wire grass, and other grasses, good hay will be seen on the exposed parts of the bales. I am satisfied that there was not any large quantity of bad hay, when delivered by the defendant, of the quality contended for by the plaintiff. The weight of the hay at that time of delivery the hay, except a small quantity, was of the quality of hay which the plaintiff saw. The evidence of defendant's witnesses who were employed by him, and who assisted in pressing the hay, saw this hay pressed, is absolutely inconsistent with the evidence of the plaintiff's witnesses.

derable quantity of hay such as the sample
 art by the plaintiff.

le to fully understand how it is that there
 of bad hay to such an extent by purchasers
 of hay said to have been part of defendant's
 , there were causes for some deterioration
 was delivered to plaintiff. Snow was upon
 s. Some was delivered wet. Then hay from
 eceived by plaintiff in a wet condition, and
 h hay delivered by defendant. The Christie
 intiff stored some of the hay, was in places
 en, and some damage was done by reason of
 weather.

laid down in *Jones v. Just*, L. R. 3 Q. B.
 tioned: "Under a contract to supply goods
 scription, which the buyer has no opportu-
 g, the goods must not only in fact answer
 scription, but must be saleable or merchant-
 description," and "the maxim caveat emptor
 to a sale of goods where the buyer has no
 inspection." That case was followed by
 rham, 14 O. R. 451.

case is different in its facts. Here the buyer,
 d an opportunity of inspecting, and, except
 did in fact inspect, he waived inspection,
 is like *Borthwick v. Young*, 12 A. R. 671,
 d that, as the sale was not a sale by sample,
 ser had not been deterred by any acts or
 defendant from making a full inspection,
 not liable on any warranty, expressed or
 upon the evidence that if there was bad
 , hay not well saved, of any considerable
 hay delivered by defendant to the plaintiff,
 uch delivery it could have been discovered
 any inspection which ought reasonably to
 Heilbutt v. Hickson, L. R. 7 C. P. 438.

vidence I think it clear that the acceptance
 ny load or bale of hay did not preclude him
 ny other load or bale which did not sub-
 r the contract: *Dyment v. Thompson*, 12
 ned by the Supreme Court of Canada, 13

delivery was the place of inspection. The
 t tied down to the exact time of delivery.

He had a reasonable time. He did not delivered until a considerable time after livery plaintiff commenced to sell the hay and when he did this, and when the hay of subsequent purchasers, plaintiff's right gone: Perkins v. Bell, 12 Q. B. D. 193.

I have read the cases cited by counsel very full and able argument, but, applying facts before me, these cases do not show entitled to succeed.

The defendant offered evidence of a Division Court between these parties as an estoppel in his claim for damages. There is no doubt that what took place is, in my opinion, important. The plaintiff then thought about the quality of hay in question, and what he thought his right was.

The defendant did not in fact deliver hay in November, 1906, to plaintiff. He sold hay to other people. After the payment by plaintiff to defendant, assuming that plaintiff desired to accept more, delivered 6 tons and 64 cwt. of hay to plaintiff at Suffels cross. Plaintiff was annoyed about it, locked up the ice-house, and refused defendant to re-take the hay, and refused to pay. The now defendant, Clark, commenced an action in Division Court . . . for the value of hay at \$13 a ton. Bouck, the now plaintiff, admitted the quantity of hay, but said it was only \$12 a ton, making \$75.84. He put up with non-delivery of the balance of defendant's hay, and the sale to other persons of 56 tons at \$1 a ton, or \$56, and Bouck paid \$19.84. The action was on 18th March, 1907, and I regard it as a matter of fact that the complaint was not only of what I thought the quality of hay but of what plaintiff on that date thought the quality of hay. The complaint was then made of the quality of hay or by any purchaser from him.

I ought to say further that, even if plaintiff contends, or if there was an issue, the evidence is not clear as to a breach. The evidence shows complaints as to the quality of hay were made to whom the complaints first came to plaintiff. I regard to what could easily have happened if the hay delivered by defendant. defendant may not

sale by auction of part of the hay, under the circumstances attending the sale, does not determine the value of the hay then sold. Plaintiff decried sample shewn by plaintiff to intending purchaser as a fair sample. One purchaser at the sale bought the hay very soon after the sale, f.o.b. at Ottawa at \$1.50 a ton. From this would have to be deducted \$1.00 a ton. That is not a complete answer, but it shows that the sale was under circumstances that would justify the sale of the hay.

Plaintiff was impressed by defendant as an honest man, but a man of unimpeachable opinions, and he, as it appeared to me, was himself up to a feeling of strong antipathy to the plaintiff. The plaintiff accepted as true what people told him not good about the defendant, and so did not regard to the sale.

Must be dismissed and with costs.

C.J.

OCTOBER 28TH, 1907.

TRIAL.

HAMILTON AND DUNDAS R. W. CO.

*Measure Grounds—Injury to Person—Licensees
No Unusual Danger—Nonsuit.*

Damages for personal injuries sustained by plaintiff to the negligence of defendants as alleged, park owned or leased by defendants.

Hamilton, K. C., and F. Morison. Hamilton, for

Plaintiff. Hamilton, for defendants.

JUDGE, C.J.:—There was no fee charged by defendant, the authority of defendants for admission to the woods." A cash fare was paid on the railway, not run into the park. In fact, there is a gap between their platform-station and the

Plaintiff is, therefore, in the position to whom no duty is owing, unless the by reason of some unusual danger known and unknown to plaintiff, which is not t

On the motion for nonsuit, I therefore—under the circumstances without co

OCT

DIVISIONAL COURT.

PLENDERLEITH v. PAR

*Costs—Taxation—Copy of Shorthand
Master's Office—Allowance between Po*

Appeal by plaintiff from order of RIR allowing an appeal by defendant from t senior taxing officer at Toronto of defe action for redemption, and allowing as costs the expense of procuring a copy of ence taken in the Master's office.

T. Hislop, for plaintiff.

H. E. Irwin, K.C., for defendant.

THE COURT (MULOCK, C.J., BRITTO dismissed the appeal with costs.

OCT

DIVISIONAL COURT.

RE CASHMAN AND COBALT AND
LIMITED.

*Mines and Minerals—Mining Claims
of Mining Commissioner — Appeal —
—Right of Claimant whose Claim ha
against Allowance of Rival Claim—"A
son Feeling Aggrieved"—Mining Act,*

Appeals by the Cobalt and James M a decision of the Mining Commissioner

the appellants and from another decision finding of the claim of Cashman.

deal was heard by FALCONBRIDGE, C.J., BRITTON, L., J.

ay, for the appellants.

Ross, for Cashman, the respondent.

L. J.—One Landrus, to whose rights the appellants succeeded, claimed to have made a valuable discovery. He alleges that he staked the claim as required by Cashman also claimed to have a right to the property in question. The claims were adjudicated upon by the Commissioner, who decided in favour of Cashman. He admitted that if the claim of the appellants were given precedence over that of Cashman; and therefore the question is whether the appeal of the company against the decision of the Commissioner disallowing their claim is well founded.

The Commissioner had before him the witnesses, and found as a fact that Landrus made no discovery of a mineral within the Act, and further that the discovery is not within the boundaries of the property claimed by Landrus or the appellants, but some little distance north of their south boundary. It is admitted that if the appeal is to be sustained, this part of the appeal must

be supported by abundant evidence upon which the Commissioner can find as he has, and unless we are prepared to depart from our own recent decision in *Bishop v. Bishop*, ante, and follow a long line of cases which are followed there, we cannot give effect to the contention of the appellants. In the present case, I do not think that the appellants have succeeded as against the claim of Cashman. Section 52 of the Act gives any licensee or person feeling aggrieved by any decision of the Commissioner, the right to appeal; but sec. 75 makes it clear that what is meant is, any licensee feeling aggrieved, and not any licensee whatsoever, who is given the right to appeal. The notice is to be served "upon all parties adversely interested"—unless an intending appellant has himself an interest or claims some interest in the property, in which case no "parties adversely interested." If the appeal against the allowance of Cashman's claim were to succeed,

the company would receive no benefit greater than any other person. In the absence of express provision giving such an extraordinary right, the claim of the appellant to appeal under such circumstances cannot be sustained.

Both appeals should be dismissed with costs.

BRITTON, J., gave reasons in writing for the above conclusions.

FALCONBRIDGE, C.J., also concurred.

RIDDELL, J.

OCTOBER 18, 1902.

TRIAL.

REX v. MICHIGAN CENTRAL R. R. CO.

Criminal Law—Indictment of Railway Company—Carrying Dangerous Explosives—Fatal Injuries—Board of Railway Commissioners—Punishment—Mitigating Circumstances—Fine.

Indictment of defendants under secs. 223 and 224 of the Criminal Code for a nuisance and for carrying dangerous explosives without proper precautions.

E. Meredith, K.C., for the Crown.

D. W. Saunders, for defendants.

RIDDELL, J.:—This is an indictment against the Michigan Central Railroad Company, presented against it by the assizes for the county of Essex. By reason of the fact that the defendants have pleaded guilty, I must now pronounce the appropriate sentence, examine the evidence, and that I am able to do only by a perusal of the report of the coroner's inquest holden a few days after the accident. At this inquest the defendants were represented by counsel, who took an active part in cross-examination and in the evidence—*and I think that the facts must be fairly established by such testimony.*

ns to me that the following was the course of
 The Pluto Manufacturing Co. of Emporia, Penn-
 shipped a quantity of dynamite under the name of
 ' paying double first class freight rate. At Black
 he State of New York, this was received by A. D.
 of that place, foreman of the freight house and
 he New York Central and Michigan Central Rail-
 panies. He says that he did not know or suspect
 as dynamite, but supposed that it was simply pow-
 ges—gun cartridges. He loaded the explosive into
 owed from the New York Central Railroad Com-
 arently a barrel of oil, and some iron pipe, a num-
 ir "powder cards," containing a warning that the
 ned high explosives, and placed these cards upon
 of the car. No care was taken by him to see that
 as proper for carrying high explosives: and in the
 placed bars of iron and a number of other parcels,
 ng filled as an ordinary way car or main line freight
 d. All the experts say that a car containing nitro-
 or dynamite should contain no other freight. The
 taken up by P. H. Sheridan, a conductor on the
 s' railway, and brought by him to St. Thomas,
 here at 8.50 p.m. of 7th August, 1907. The car
 opened at Welland, and part of the freight taken
 on its arrival at St. Thomas it was "switched to
 t foreman" at the freight house. At that point
 t foreman, William Stubbs, found the car on the
 f the 8th—it was then sealed but had in it goods
 to St. Thomas, a coil of rope, two boxes (one of
 ware), and some plates of steel. These were taken
 ng nothing in the car but the boxes of "powder"
 ently a barrel of oil, and some iron pipe. The
 t. Thomas on the morning of the 9th at 7.10, and
 Essex at 2 p.m. of the same day. The car was
 Ridgetown, and it was found that two or three
 he explosive had shifted and were on edge; and
 ctor, Alexander McIntosh, knew that it was explo-
 s carrying, but did not replace the boxes or touch
 he car was left at Essex near the freight house.
 ing at about 7.40 the car was "found" by con-
 omas of the Amherstburg train, and on being
 making up his train, cracking was heard on or
 car. The conductor then examined the car and
 loaded with boxes of dynamite, and it was found

also that the boxes were leaking and the boxes had leaked and was still leaking from the bottom of the car—4 or 5 of the boxes being righted. The boxes were righted, but no pains taken on the axles, bolsters, or running gear of the car. A barrel of oil and iron pipe were taken out of the car and 6 pieces of freight were put in. The car was moved, the engine, and, after being moved about 100 feet, cracking noises continuing loudly, a terrible explosion took place, killing two men on the spot, and mortally injuring about 40 others.

Some of the expert evidence tends to show that the boxes been so loaded that they could not get out of the car and so that no other freight could strike them and not have been so much danger. No care was taken by the company to see to it that the car was not taken by this high explosive knew how to deal with it. A man sent with the shipment to attend to it; but the dangerous substance was shipped with no more precaution than a carload of potatoes. It is a pity to run cold to consider the history of this car. It was leaky, loaded partly with dynamite and partly with freight, shunted into the yard at St. Thomas on the night, taken the next day to Essex, shunted there in the afternoon, and after staying there a day and night, moved backwards and forwards with detonations and no one taking the slightest care.

It is true that there were placards showing that the car was laden with high explosives, and that is entirely why the Board of Railway Commissioners refused to allow a prosecution under the Railway Act. For this refusal, I should have thought that an ordinary freight car would not be sufficient for the purpose "designated for the purpose" as required by the Act. It may be well to say a word or two about the railway companies, under circumstances like these, to see how far the defendants were called upon to do. At the common law it is clear that a carrier cannot be compelled to carry such goods as these, of a dangerous nature. Common carriers "are not bound to carry dangerous articles such as nitroglycerine, dynamite," etc. (vol. 6, p. 372 B; 3 Wood's Railway Law, section 113; California Power

Co., 113 Cal. 329; Railroad Co. v. Lockwood, 17 And it is the clear duty of those offering such shipment to notify the carrier of their nature, and the precautions may be taken.

Railway Act does not take away this right of railway which they had at the common law, but, on the expressly provides that the company shall not "be to carry upon its railway, gunpowder, dynamite, or any other goods which are of a dangerous nature." R. S. C. 1906 ch. 37, sec. 286. And goes on to provide that "every person who sends by railway any such goods shall distinctly mark their the outside of the package containing the same, and give notice in writing to the station agent of the company whose duty it is to receive such goods to whom the same are delivered." R. S. C. 1906 ch. 285 (2). And further: "The company may refuse any package or parcel which it suspects to contain goods of a dangerous nature, or may require the same to be opened to ascertain the fact." R. S. C. 1906 ch. 37,

It can be seen that the Parliament of Canada have taken great pains in protecting railways, and have made that department certain which formerly was to be gathered in a shapeless indefinite form from such cases as *Crouch v. Great North Western R. W. Co.*, 14 C. B. 255; *Brass v. Maitland*, 6 E. & B. 470; *Farrant v. Bowes*, 11 C. B. N. 100; *Nitroglycerine Case*, 15 Wall. 524; *Edwards v. Sherburne*, 107 Mass. 604; *Boston and Albany R. Co. v. Shanley*, 107 Mass. 604; *Pate v. Henry*, 5 St. & P. 101.

It is open to a railway company absolutely to refuse to carry goods of this character, and there exists no authority which can compel the company to do so. The company may fix such a rate as to enable them to use all the means to employ the number and kind of servants necessary for the safety of the public. The statute provides that a railway company shall not carry any such goods of dangerous nature except in cars specially designed for that purpose, the sides of which cars shall plainly appear in large letters the words "dangerous explosives." R. S. C. 1906 ch. 37, sec. 287.

This provision, however, gives the minister the power to require the company to observe the provisions of the Act, and these defendants have recognized, and indeed it must be presumed that they much more may and in many cases will be required to observe, an observance of this section. In this case it is the humble judgment, that the statute is not enough to order to indict a railway company under the Act, it is necessary that the leave of the Board of Railway Commissioners shall first be obtained.

R. S. C. ch. 37, sec. 411, fixes the penalty for an offence against the section of the Railway Act referred to (sec. 287), and sec. 431 (4) provides that a prosecution shall be had against the company if it is proved under this Act in which the company might be liable for a penalty exceeding \$100, without the leave of the Board being first obtained. Upon application to the Board being declined to allow a prosecution under sec. 287, the evidence.

No indictment, therefore, was preferred under the Railway Act, but the defendants were indicted under secs. 221 and 247 of the Criminal Code, and a count was added under sec. 279 of the Code, which was withdrawn by the Crown, and the defendants were allowed to plead upon the following indictment:

"The jurors for Our Lord the King upon oath present that the Michigan Central Railroad Company on the 9th day of August, in the year of Our Lord 1900, in the county of Essex, and at other places in the said county, were guilty of a common nuisance, and the jurors aforesaid upon their oath aforesaid present that the said Michigan Central Railroad Company at the time and places aforesaid, were guilty of an offence in that the said the Michigan Central Railroad Company had then and there under their charge and custody certain inanimate things, to wit, a certain car containing an explosive substance, and the said explosive substance, being such that they, by the absence of precaution and care, endanger the lives of the people, thereby the said the Michigan Central Railroad Company came and was under a legal duty to take such precautions against and use reasonable care to avoid such

that the said the Michigan Central Railroad Company had there omitted without lawful excuse to perform duty."

When the grand jury, I directed them that if they found the company had done all that was reasonable in providing proper care and instructing the employees as to how such dangerous goods should be handled, no bill could be found against the company—that, if they found the company had omitted any reasonable precaution, they might find a bill—and that if it appeared that any of the company within Ontario had omitted anything which he knew or should have known to be a reasonable precaution, or if he had not in all matters been reasonably careful, a bill would be prepared against the employee. The grand jury was further directed that the finding of a bill against one did not exclude a bill against the other, and that it was their duty to consider the evidence offered to them whether the railway company was guilty of an offence—but in considering that, they were to also consider whether it appeared to them that the employee should be indicted as well—and if so a bill was to be laid before them against such employee. The grand jury's action have apparently exonerated the employees at least those who had charge of the explosive in

On arraignment, counsel for the defendants pleaded guilty to the two counts already set out—and the Crown prosecutor withdrew the remainder of the indictment.

When I asked counsel for the defendants if he had anything to say why the judgment of the Court should not be pronounced upon his clients for the indictable offence, as they had been found guilty, the following took place according to the reporter's notes:—

Lordship: Have you anything to say why the judgment of the Court should not be pronounced on your clients for the indictable offence to which they have pleaded guilty?

Counsel: Yes, my Lord, one or two considerations I wish to urge upon your Lordship. The Michigan Central Railroad Company have instructed me to plead guilty. I have done, for two considerations. They are of

the opinion that the prime cause of the accident was the defective condition of this explosive which was sold under another name, powder and cartridges, but they cannot deny, at the same time, certain negligence or want of duty on their part. That is the first consideration.

"In the second place they recognize that a plea of a criminal charge of this sort, must necessarily involve to some extent the question as to who the blame should be attributed to their officers and servants. They do not desire to take that position and prefer to plead guilty to the charge as they have done.

"The company must, therefore, throw itself upon the mercy of the Court in regard to the punishment. Your Lordship will see fit to inflict, and they will submit to, upon your Lordship the consideration that they are now and are arranging to pay and will have to pay a large sum of money for the damages, civil damages, which have been occasioned to property and to persons. This will cost them a very large sum of money. I should urge would be a consideration that your Lordship might well take into consideration in imposing a fine or penalty. If your Lordship sees fit, I am prepared to take to furnish the Court with the particulars of the damages and claims, so that your Lordship may have before you in making up your mind as to what would be a proper verdict to enter."

"His Lordship: The objects of punishment in a criminal prosecution are generally two. The first is to bring the offender to a sense of the wrong which he has done, and to bring about a state of penitence in that offender. It applies in but a very slight degree to a corporation which has been found guilty; and the fact that the company in pleading guilty shews that, so far as consideration can, the corporation recognizes its guilt. The second consideration is the prevention of the perpetration of similar offences by others; that is the end to which punishment as a rule is directed. I have always thought that the more I think of it the more I am sure I am right. If railway companies were made more costly to railway companies to disobey than to obey the law, offences against the law would be much diminished.

not been that the railway company have already, fined, paid very dearly for their offence, a sum hundred times the money they would make out on such material in a year, the fine which I (the only punishment in my power) would levy a very large one.

However, right that I should consider and I shall act, if it be the fact, that the railway company paid out large sums of money through this will probably be obliged to pay out further before, if I am furnished in some official form, that it may go on record, and not be gainsaid at any time, with evidence that the railway company paid a large sum, and a statement of the amount expended, I shall take that into consideration in the amount of the fine, which I shall in the exercise of my power impose on this railway company. That cannot be to-day, I take it, and moreover it is a matter I do not want to act hastily. It is not as though the offence been committed yesterday and must be punished immediately. I intend to act with due deliberation and care, as I have done about the first case of the kind in our criminal

of the first ground urged, namely, that the cause of the accident was the defective condition of the car. I refuse to give the slightest weight to any such allegation. Railway companies are, for the benefit of the public, granted extraordinary powers, and they must be held to strict account as to the manner in which they exercise those powers for the performance of which they are granted those powers. They must be held to know that some of their powers, like every other commodity, are not very perfect, but defective, and they must entirely satisfy the public as to the safety of what they carry, or use other means for the protection of the public. In my view, it is not to require of a railway company, if it persists in using explosives, to do so only in cars made for the purpose, in a train on which no other freight or passengers are carried, and accompanied by a person who understands how to deal with such explosives, if by any chance there should be a leaking or should other trouble ensue. It is not to cost money—but an accident such as this costs

money also—and it is open to railway companies to fix such a rate of freight as will recompense expenditure. However that may be, it is the duty of railway companies to take all due care of their property, and the property of others, no matter what it is.

In this particular case it would seem that the car of dynamite been carefully braced or fixed so that they would not shift their position, and **been so made that the fluid could not make its way to the bottom of the car, or if any one who knew the nature of the substance and how to handle it had begun to leak had accompanied the shipmaster, the calamity would not have occurred.**

Nor do I attach the slightest importance to the statement of counsel, namely, the question of the guilt of company and employee. The company appears, took no care whatever to have the car constructed in the handling of such material of that character does not come by instinct. It has subjected these very employees to the grave danger of this inexcusably careless method of handling dynamite. If the employees were negligent, they may be punished for such negligence civilly and criminally, but they are not to be allowed to diminish in any way the criminal responsibility of the employers. I must and shall continue to regard these defendants were wholly and completely responsible of the lamentable accident—we continue to regard these accidents—"crimes" were the better.

I reiterate that it is my firm, well established belief that the best way to prevent similar occurrences or crimes, whichever word may be selected, is to make it costly for railway companies to violate the rules and serve it. The great defect in our system is the lack of an officer whose duty it is to watch for offences and cause offenders to be prosecuted. Such legislation we have enough and to spare, but we have failed to provide prompt and sure methods of detecting and punishing offences. The practice of shipping dynamite in the manner disclosed in this case has apparently been going on for years without detection, and it would not have been discovered had not the explosion happened.

It follows that, when an offence against the law is obvious, it is prosecuted.

It has been proved in this case, and it remains to inflict the appropriate punishment.

It is ordered upon affidavit that the cost to the company

be paid or certain to be paid, about \$11,000
 as to company's own property. 4,700

There are claims to an amount over \$50,000 which
 have been adjusted.

Under these circumstances I reduce the fine which otherwise
 I might impose—although I shall not impose a merely

The sentence of the Court is that the Michigan Central
 Company do pay as and for a fine for the indictment
 of which they have admitted their guilt and for
 Our Sovereign Lord the King, the sum of
 £100 in the second count. If this sum be paid to the
 Crown within 30 days from this date, the Attorney-
 General be instructed to direct that no further pro-
 secution be taken. If not, I shall deliver judgment upon
 the indictment at the opening of the next Sandwich Assizes,
 and the Court will stand adjourned after the
 giving of this judgment.

I add that if it were the fact that the board of
 directors of the general manager of the defendants' com-
 pany was one responsible directly or indirectly for the
 explosion on in the transportation of explosives, re-
 sulting in the jurisdiction of this Court, I should have
 ordered their being indicted as well as the com-
 pany right and just that employees of whatever grade
 involved upon trial when any negligence of theirs
 resulted in death, and the higher officers through whom
 the system is put or kept in operation should not
 escape. I am not of those who frown down the stern
 application of the criminal law. There is many
 who would laugh at a fine who would dread the ob-
 liviousness of the prisoner's dock and shrink before the door of the

penitentiary. But I have not been able to get any Crown officers or the grand jury—to find any man, high or low, in the service of the company within the jurisdiction of the Court who can be said to be guilty (except through ignorance so far as concerning the law) of the guilty authors of the shocking casual law is concerned, those who are really responsible for the bloodshed at Essex on that fateful August 18th, 1842, to their own conscience and the court of public opinion.

I may also add that I have received from a number of persons who have claims against the company complaining that they have no redress. The town council of the town of Essex have passed a resolution requesting me to suspend judgment until payment of the claims arising from the communications are somewhat irregular. I have thought that they were made with any intention of defrauding the company. The representation of the private communications has been transmitted to the company, and I have assured that some of these claims are in the hands of the law; as to some others it is a mere question of time.

But in any case I could not use the criminal law as a lever to be used as a lever to enforce the claims for damages. Any one who puts the law in force for the purpose of bringing about the payment of a civil claim is guilty, in law and in fact, of a wrong—and I, administering the law, may be guilty of a wrong. I must, sitting as a Judge, reprobate in the penalty I have given consideration to the claims of the company only to what has been paid and what is to be paid—and if the company should have to pay more, that is their misfortune.

However that may be, no more in Canada than in mediæval Venice, may a man do a great right, do a little wrong."

OCTOBER 29TH, 1907.

DIVISIONAL COURT.

RE RODD.

*Minerals — Appeal from Decision of Mining Com-
— Evidence — Re-inspection—Ex Parte Report
ment Inspector — Finding of Commissioner —
Appellate Court.*

al by J. H. Rodd from the decision of the
Commissioner cancelling the appellant's mining

Carthy, K. C., for the appellant.

rtwright, K. C., for the Commissioner.

ment of the Court (FALCONBRIDGE, C.J., BRIT-
DELL, J.), was delivered by

J.:—The learned Commissioner in his written
judgment says that, after hearing the evidence
deeming it unsatisfactory as regards the merits
very, and the circumstances disclosed regarding
f the samples being such as to lead him to be-
they were not samples which had been wholly
he claim, "and there being in fact nothing else
own in connection with the discovery which any
the least experience in such cases could think
as to any extent establishing a discovery," he
e-inspection by another government inspector.
es on to say that the report of this inspector
leged discovery to be worthless.

Carthy, for the appellant, pressed us with an
at it was contrary to natural justice to allow
f an inspector who was not subjected to cross-
to determine the judgment of the Mining Com-
d be offered to pay the expense of a further in-
the Court would direct that the matter should
further evidence or a new trial.

Without deciding how the case would stand if the decision of the Commissioner was based upon evidence which had not been sifted by a jury, and without deciding whether we had authority to do more than allow or dismiss an appeal, that in this case the appellant must fail.

The Commissioner has in substance said that he believe the evidence adduced by the applicant to satisfy my mind that he was entitled, and that nothing more he could not succeed. But, he says, be something on the ground not brought forward to avoid doing an injustice to the applicant, I have ordered the agent inspector to re-inspect. He reports that to my mind, but the contrary." I think this is based upon the evidence already adduced, and not upon the inspector's report.

Of course, in appeals from decisions of the Commissioner the same rules must apply as in appeals from any other judicial officer. . . .

Appeal dismissed without costs.

RIDDELL, J.

OCTOBER

TRIAL.

MADILL v. MCCONNELL

Will — Execution of — Undue Influence — Capacity — Evidence — Demeanour of — Credibility — Character Evidence — Request to Church — Alleged Procurement — Dismissal of Action — Costs — Solicitors' — Defendants Making Common Cause — Executors' Costs.

Action for a declaration that a certain writing was not the last will and testament of the deceased.

G. W. Bruce, Collingwood, for plaintiff.

H. Cassels, K.C., for defendants the President of the Board of Trade in Canada.

J. Porter, Simcoe, for defendants the County of Simcoe.

C. E. Hewson, K.C., for other defendants.

L, J.:— . . . The statement of claim alleges that Joseph Madill, being under the influence of his Rev. Mr. McC., was, while he was in a weak and condition of body and mind, induced by him to do so; that this will was so made by Joseph Madill as not of testamentary capacity; that the will was duly executed; and that the provisions of the said will are ineffectual in law.

I say at once that there is no foundation for the allegation of undue influence, irregularity of execution, and of the legates.

The only question is, whether the testator was, at the time, of testamentary capacity. Considerable evidence was given, more or less vague character, indicating a failure of memory and mental power; and Dr. N., the attending physician, gave more specific evidence—Dr. M. being then an expert to give his opinion upon the evidence.

The defendant McC., being called, gave a very full account of the circumstances under which the will was made; and it is admitted that, if he is to be believed, the testator was of testamentary capacity, and the will is valid. The plaintiff, recognizing this fact, called a number of neighbours to testify that from the reputation of the testator they would not believe him on oath. Some of these witnesses spoke from dealings they had had themselves, but not from the conditions of such evidence. Several of the witnesses belonged to a malcontent section of the parish, the witness's church, and some seem to have had dealings with him. He appears to have been agent for the testator in bearing and other stocks, and to have sold some of the property to his friends. Even with the altered meaning of the word, it seems as unwise now as it was 1900 years ago to send a minister to preach to carry "scrip"—many cases in which have shewn the danger of serious trouble arising from ministers dealing with such precarious merchandise, both to themselves and others.

I do not and do not place much reliance on this character of evidence—much of it was clearly given gladly and with a view to injure the minister; and I thought that much weight should be given without a thorough understanding of the facts upon which such evidence should be based. From the events, from the conduct and demeanour of Mr. Madill, I was and am convinced that he was telling

Dr. M. was not recalled after the evidence and it was admitted that he would and must have been a disbeliever in the deceased had a disposing mind if Mr. McC. told the truth. The opinion of Dr. M. was based upon the evidence of Dr. N., and I do not find confidence in the accuracy of that evidence.

If the evidence of Mr. McC. and that of Dr. N. are consistent, I accept the evidence of the cases I judge of the credit and weight to give to the evidence by the conduct and demeanour of the witnesses.

Had I the slightest doubt as to the substance of the evidence of Mr. McC. (which I have no doubt can be removed by the evidence of the Rev. Mr. M., in whom there is no imputation). He gave conversations with the deceased, a few months before he was drawn, which indicated that his mind was in the direction the will displays.

Moreover, no benefit of any kind accrues from the provisions of the will. The suggestion that the executor's remuneration he would equally receive if the will were drawn in any other way—and if he were as rascal as to have a will made by an incompetent person—a natural thing to expect would be that he would have some substantial benefit for himself.

I find that the charges against Mr. McC. are entirely without foundation in fact, and should be dismissed.

In the exercise of my discretion, I direct that the costs of the executors and of the church be paid by the executor and client, by the plaintiffs and the defendants in common cause with them, i.e., Mary Van der Pijl, Sorntall, Letitia McLaren, Richard Langtry, and Thornbury. Counsel for these stated at the trial that they were making common cause with the plaintiffs and assisted counsel for the plaintiffs throughout the trial. The practice of bringing actions in the name of the next of kin, and making the others parties, is sometimes necessary—but parties so made should understand that if they make common cause with the plaintiffs, they do so at their peril as to costs. The fact that in form they are defendants will not protect them.

My power to award costs between solicitor and client in such a case as this seems to be established by *Parnes*, 39 Ch. D. 133; *Sandford v. Porter*.

cases cited; although the rule may be different in common law action: *Cree v. St. Pancras*, [1899], at p. 698. And it has been held in England that a successful party may be ordered to pay the unsuccessful party: *Myers v. Financial News*, R. 42; *Neale v. Winter*, 9 Gr. 261. So that, could be considered that these defendants were (not) successful, they might be ordered to pay

litigators will be entitled to all costs out of the pocket of the solicitor and client, which they cannot make good; ordered to pay; the Presbyterian Church being the gatekeepers, it is unnecessary to make such an order

OCTOBER 30TH, 1907.

DIVISIONAL COURT.

ARK v. C. H. HUBBARD CO. LIMITED.

Statement of Assets and Goodwill of Company—Proportion of Purchase Money by Instalments—Release by Agreement—Conflicting Evidence—Finding of Judge—Appeal—Invalidity of Novation Contract—Legal Consideration—Powers of President and Manager of Companies—Acquisition of Shares of Company by another—Ultra Vires—Delay of Action in Repudiating Novation Contract—Change of Position—Estoppel.

by plaintiff from judgment of FALCONBRIDGE, and by using an action to recover \$2,842 and interest.

higher, for plaintiff.

myth, for defendants.

gment of the Court (MULOCK, C.J., ANGLIN, J.), was delivered by

ANGLIN, J.:—The plaintiff sues to recover \$2,842 and interest thereon, alleged to be due under an agreement made by the defendants on 21st April, 1903, whereby they promised to pay to him the balance of the purchase money of the assets of the Clark Dental Manufacturing Company, with interest on deferred payments. Judge . . . found that, by agreement of 21st April, 1903, and slightly altered and confirmed on 26th October, 1903, the plaintiff, in consideration of stipulations in his favour then made by Dr. Beattie Nesbitt, agreed to release and discharge the defendants, the Hubbard Company, from their obligations under the agreement of 21st April, 1902. The finding as to the character of the negotiations between the plaintiff and Dr. Beattie Nesbitt and as to the purpose of the memorandum executed on 21st April, 1902, and confirmed on 26th October, 1903, by the signature of the plaintiff and Dr. Beattie Nesbitt, is conflicting. In view of the conflicting evidence the trial Judge has found that the purpose of the parties was to effect a release by agreement releasing the defendants and discharging them as debtors to the plaintiff the obligation created by the agreement. It is impossible to say that there was not sufficient evidence to support the finding of the trial Judge. Justice. With that finding it is therefore unnecessary for us to interfere.

The plaintiff, however, urges that the release was invalid and ineffectual, because, as to the consideration which it purported to give, the release of the Hubbard Company from liability was not a release. The memorandum of this agreement is in the following form:—

\$11.50

30 dy.

300

850 due 27th Sept.

6 per cent.

Clark receives

2,500 pref. stock.

1,250 com. stock.

300 draft accepted by C. D. H.

850 draft accepted by C. D. H. C.

\$1,300 a year

plus \$50 for every 1 per cent. div.

declared on common stock

accepted

April 21st, 1903.

T. N. Clark.

Oct. 26th, 1903.

Beattie Nesbitt.

T. N. Clark.

Ten dollars a week extra for winter

N.

proved by the evidence, this memorandum means \$1,150 then due him under his agreement with the plaintiff was to receive two drafts, one for the other for \$850 accepted by the C. D. Hubbard he was to enter into the employment of the Dominion Chair Company at a salary of \$1,300 a year, in addition a bonus of \$50 for every 1 per cent. declared upon the common stock of the Dominion Company; and that, in consideration of this agreement of his release of the Hubbard Company from further liability, he was to be given \$2,500 worth of preferred stock, and \$1,250 worth of common stock, paid up, in the Dominion Chair Company. This was the original agreement, on 26th October, was modified by a provision that in the winter the plaintiff's salary from the Dominion Company would be increased by \$10 a week. The items providing for the transfer to him of the Dominion Company and common stock that the plaintiff contends the agreement is illegal.

the name of the defendant company nor that of the Dominion Chair Company appears as a party to this agreement. Dr. Beattie Nesbitt, however, testifies that the agreement he acted as president and general manager of both of the defendant company and of the Dominion Company. The evidence makes it clear that he was president of both companies, and that he had the control of both and the widest powers of a general manager.

Hubbard Company owned the business of the Clark Manufacturing Company, which the Dominion Chair Company was incorporated to take over. The defendant

company transferred this business, with all goodwill, to the Dominion Chair Company, of the receipt from that company of a large bill to be allotted to the vendor company as stock. This stock appears to have been issued on the name of Dr. Beattie Nesbitt as trustee for Hubbard Company Limited. Out of the stock the plaintiff was to receive the shares stipulated in an agreement of 21st April, 1903. The plaintiff is that it was ultra vires of the Hubbard Company to acquire this stock, and that, if it is the stock which he is to receive, that company could not acquire it directly or through Dr. Beattie Nesbitt, validly or otherwise. It is that the plaintiff could not make title to it. On the other hand, the agreement is to be regarded as validly made by the Dominion Chair Company through Dr. Beattie Nesbitt to allot and issue this stock to the plaintiff. It is that the latter company could not properly issue the stock as paid up stock, and that under his agreement the plaintiff is paid up stock that he can be asked to take.

That the arrangements between the plaintiff and the two companies in question, effected through Dr. Beattie Nesbitt, most informal, and possibly such as the plaintiff could have enforced the performance of, may be a question. It appears to have been on all sides an utter neglect of the usual formalities accompanying transactions of this kind, and Dr. Nesbitt seems to have acted as a trustee. The very fact and deed both the Hubbard Company and the Dominion Chair Company.

But the plaintiff under the agreement with the Dominion Chair Company has received payment of the two bills for \$300 and the other for \$850; he has also received salary upwards of 3 years from the Dominion Chair Company amounting to something over \$4,000. From the date of making of this agreement until the summer of 1906 he appears to have made no claim upon the Dominion Chair Company. He does not in his present action make any claim for the moneys which he has received, and, inasmuch as he has given 3 years' service to the Dominion Chair Company, cannot return the salary received without compensation. If unpaid for these services, it is practically

the parties in the same position as they occupied before the agreement of 21st April, 1903, was entered into.

Whether or not the plaintiff might have been his rights had the plaintiff repudiated the novation arrangement, it is entirely immaterial now, because of any part failure of consideration in the agreement, to open up the entire transaction and to put the plaintiff in the position in which he held before releasing them.

Now, it is asserted by counsel for the defendants that the stock for which the plaintiff stipulated in the agreement of April, 1903, has been allotted to him by the Dominion Chair Company, now the Clark Manufacturing Company, and that the certificates for such stock can be obtained at any time he chooses to seek them. If this is so, the plaintiff has not paid up stock, as the plaintiff alleges, and is not entitled to obtain paid up stock because of the inability of the defendant company or the Clark Manufacturing Company to give him such stock, it may be that the plaintiff has a cause of action for damages, if not against either of these companies, against Dr. Beattie Nesbitt, because he personally undertook by the agreement of April, 1903, that the plaintiff would receive such stock, or that he entered into this agreement, on behalf of either the defendant company or the Dominion Chair Company, with implied representation that he had authority to bind and bind either one of these companies to give the plaintiff the stock in question. Upon this aspect of the case it is necessary to express any opinion.

The plaintiff's appeal, in my opinion, fails because he has acted downwards and upwards upon the agreement of April, 1903. He has permitted the Dominion Chair Company to act upon the same agreement, has himself received very considerable benefits under the agreement, and has, during the proceedings, withheld all claim against the defendant company. The appeal should be dismissed. But, inasmuch as the plaintiff's disregard of formality by the defendants or their agent, Dr. Nesbitt, afforded plausible grounds for the attitude of the appellants, we think he should not be required to pay the costs of the appeal.

company transferred this business, with all goodwill, to the Dominion Chair Company, of the receipt from that company of a large bill to be allotted to the vendor company as its share. This stock appears to have been issued on the name of Dr. Beattie Nesbitt as trustee for the Hubbard Company Limited. Out of the stock the plaintiff was to receive the shares stipulated in the agreement of 21st April, 1903. The plaintiff's case is that it was ultra vires of the Hubbard Company to acquire this stock, and that, if it was, which he is to receive, that company could not give it directly or through Dr. Beattie Nesbitt, validly to him, and could not make title to it. On the other hand, the agreement is to be regarded as made by the Dominion Chair Company through Dr. Beattie Nesbitt to allot and issue this stock to the plaintiff, and that the latter company could not properly refuse to do so, as paid up stock, and that under his agreement the plaintiff is paid up stock that he can be asked to take.

That the arrangements between the plaintiff and the two companies in question, effected through Dr. Nesbitt, most informal, and possibly such as the plaintiff could have enforced the performance of, may be a question. It appears to have been on all sides an utter neglect of the usual formalities accompanying transactions of this kind, and Dr. Nesbitt seems to have acted as a mere agent, and very fact and deed both the Hubbard Company and the Dominion Chair Company.

But the plaintiff under the agreement with the Hubbard Company has received payment of the two shares for \$300 and the other for \$850; he has also received salary upwards of 3 years from the Dominion Chair Company amounting to something over \$4,000. From the date of making of this agreement until the summer of 1906 he appears to have made no claim upon the company. He does not in his present action make any claim for the moneys which he has received, and, inasmuch as he has given 3 years' service to the Dominion Chair Company, cannot return the salary received without compensation. If unpaid for these services, it is practically

parties in the same position as they occupied before the agreement of 21st April, 1903, was entered into.

Whether or not the plaintiff might have been his rights had the plaintiff repudiated the novation arrangement, it is entirely immaterial now, because of any part failure of consideration of the agreement, to open up the entire transaction and put the plaintiff on his merits in regard to the defendant company to the extent of the stock which he held before releasing them.

Further, it is asserted by counsel for the defendants that the stock for which the plaintiff stipulated in the agreement of April, 1903, has been allotted to him by the Dominion Chair Company, now the Clark Manufacturing Company, and that the certificates for such stock can be obtained at any time he chooses to seek them. If this is not paid up stock, as the plaintiff alleges, and if the plaintiff is unable to obtain paid up stock because of the inability of the defendant company or the Clark Manufacturing Company to give him such stock, it may be that the plaintiff has a cause of action for damages, if not against either of these companies, against Dr. Beattie Nesbitt, because he personally undertook by the agreement of April, 1903, that the plaintiff would receive such stock, or that he entered into this agreement, on behalf of either the defendant company or the Dominion Chair Company, and implied representation that he had authority to bind and either one of these companies to give the plaintiff the stock in question. Upon this aspect of the case it is necessary to express any opinion.

The plaintiff's appeal, in my opinion, fails because he has acted downwards and upwards upon the agreement of April, 1903, he has permitted the Dominion Chair Company to act upon the same agreement, has himself received very considerable benefits under the agreement, and has, during the proceedings, withheld all claim against the defendant company. The appeal should be dismissed. But, inasmuch as the plaintiff has shown a disregard of formality by the defendants or their agent, Dr. Nesbitt, afforded plausible grounds for the attitude of the appellants, we think he should not be required to pay the costs of the appeal.

BOYD, C.

JULY

WEEKLY COURT.

PLENDERLEITH v. PARSONS

Mortgage — Redemption — Rate of Interest payable — “Liabilities” — 63 & 64 Vict. ch. 29 (D.).

Appeal by plaintiff from the decision of the Court of Appeal, 9 O. W. R. 265, upon the question of interest.

T. Hislop, for appellant.

H. E. Irwin, K.C., for defendant.

BOYD, C., held that the proper construction of the word “liabilities” in 63 & 64 Vict. ch. 29 (D.), was that it meant the statutory rate of interest being 5 per cent., with the proviso that the former Act, R. S. O. 129, is not to apply to liabilities existing at the time of the passing of the Act, but to liabilities respecting the rate of interest in a mortgage made in 1884, payable in 1900, and interest at 7 per cent., in which there was no provision for payment of interest after maturity, the damages as interest after maturity were not within the scope of the Act.

The appeal as to the rate of interest was dismissed. It was directed that interest should be computed only after July, 1900.

THE
TORONTO WEEKLY REPORTER

TORONTO, NOVEMBER 14, 1907.

No. 25

CORRECTIONS.

636, ante, line 9 from top, omit the words "there
hence that."

from bottom of same page, for "a" read "no."

661, ante, in line 11, insert a comma after the
r," and in line 12 strike out the words "apparently
of oil and some iron pipe."

669, ante, in line 20, substitute "requested" for
ced."

Copy, 1900, at 10 a.m.
Mortgage Act, R. S. O. 1897 ch. 148, sec. 18,
"every mortgage or copy thereof filed in pur-
s Act shall cease to be valid, as against the cre-
persons making the same, and against subse-
asers and mortgagees in good faith for valuable
after the expiration of one year from the
ling thereof, unless within 30 days next preced-
ation of the said term of one year a statement,
in the office of the clerk of the County Court."

For the appellant it is contended that the amendment was filed too late; that to be in time it should have been filed at the latest at some time on 25th.

In my opinion, it is only necessary to refer to the language of the statute to see that this contention is untenable. The year within which the renewal is to be made is computed "from the day" on which the mortgage was filed. This necessarily means that the year begins at the first moment of time after that day has passed. Were the language "from the time of filing," the contention might have much weight. If authority were to support the view that the year within which the renewal is to be filed must be computed exclusively from the day on which the mortgage itself was filed, the case of *Co. v. West Metropolitan R. W. Co.*, [1904] 1 K.B. 101, it. At p. 5 Mathew, L.J., says: "The rule is that where a particular time is given for the doing of an act, the date, within which an act is to be done, the day named is to be excluded."

A number of American cases cited in *Co. v. West Metropolitan R. W. Co.*, at p. 592, were referred to by the appellant. Of these it is sufficient to say that in none of them it appears that the language of the statute was applied upon which these American decisions turn. The rule is with that with which we are now dealing.

The appeal fails and should be dismissed.

MULOCK, C.J., gave reasons in writing for the above conclusion.

CLUTE, J., concurred.

CARTWRIGHT, MASTER.

NOVEMBER 1904.

CHAMBERS.

PROUSE v. TOWNSHIP OF WEST ZORRA.

Parties — Joinder of Defendants — Pleading of Action — Negligence — Dangerous Fences — Private Owner — Municipal Corporation.

Motion by defendant Dawes for an order of certiorari to elect against which defendant he will

Holman, K.C., for defendant Dawes.

Unbar, for defendants the corporation of the township of West Zorra, supported the motion.

Wilkie, for plaintiff, contra.

MASTER:—The statement of claim alleges that the lands adjacent to the road in the township of West Zorra; that he "unlawfully and negligently built and maintained a barbed wire fence in front of said lands, and so as to render the travelled portion of the said road allowance as to render it dangerous to use the said travel- as a highway." It then alleges that Dawes built a fence "out into the road allowance so as to enclose a portion thereof within the said fence, and so as to leave the said fence dangerously near to the travelled portion of the said highway, and to leave the remaining portion of the highway so narrow as to be dangerous to using the same."

Paragraph 6, which follows, says: "The defendants the corporation of the township of West Zorra negligently and unlawfully allowed and permitted the said fence to be built and maintained as aforesaid, and the highway to be in such dangerous condition."

It then alleges that a valuable horse of the plaintiff was injured by the encroaching fence, and claims unstated dam-

The motion *Baines v. Town of Woodstock*, 6 O. W. R. 694, was relied on. The exact words of the statement of claim in that case are not given in the report, and I do not now recall them. That case, however, is not understood, disapproved by Meredith, C.J., in *Cluff v. Cluff*, 8 O. W. R. 780. It can, therefore, be considered as binding.

In these cases much depends upon the exact form of the pleading, and from what is stated about the pleading in the present case, there seems to have been a distinct allegation of negligence on the part of the corporation after knowledge of the wrongful act of the Patricks.

The pleader seems to have paid attention to that case and to that of *Collins v. Toronto, Hamilton, and Buffalo Ry. Co.*, 10 O. W. R. 84, which was affirmed by the Court, *ib.* 263.

For the reasons given in the Collins case and the decisions there cited, I think the plaintiff sufficiently alleges a joint cause of action, and a joint plaintiff cannot be required to elect if he chooses to run the risk of having his action dismissed at the trial of the defendants.

The motion will be dismissed; costs in the plaintiff's favour.

CARTWRIGHT, MASTER.
ANGLIN, J.

NOVEMBER 11, 1898.
NOVEMBER 11, 1898.

CHAMBERS.

TRETHERWEY v. TRETHERWEY

*Evidence — Motion to Divisional Court for
Discovery of Fresh Evidence — Examination
on Pending Motion — Appointment for
Trial — Rules 491, 498.*

On 19th October defendant served notice on plaintiff to set aside the judgment of the Divisional Court to set aside the judgment and dismiss the action, or for a new trial on the grounds, and, among others, on the ground that the discovery since the trial of material evidence would defeat the action, in defendant's opinion.

In the notice it was stated that the action was supported by the examination of 5 named witnesses as by the affidavit of the defendant filed.

In pursuance of this notice the defendant obtained an appointment from a special examiner for the examination of the 5 witnesses on 26th October, on the plaintiff's application.

On 24th October plaintiff moved to set aside the appointment as irregular and unauthorized because leave had not first been obtained from the Court, and that, in any case, the proposed examination would not be received as shewing grounds for a new trial.

W. E. Middleton, for plaintiff.

R. McKay, for defendant.

THE MASTER:—The affidavit of defendant in support of his notice of motion was not filed or made un-

ly explains the nature of the proposed evidence, that he had no way of discovering this evidence trial. It was argued with much confidence that does not apply to the present case, but that it is Rule 498 (3). Whatever may be the view which prevails on this question, I do not feel myself at all contrary to the deliberate opinion expressed recently by the careful Judge the late Mr. Justice Street in *Grand Trunk R. W. Co., 2 O. W. R. 654*, more recently in *6 O. L. R. 425*. There it was distinctly said that evidence in cases like the present could be taken under the appointment. The appointment was set aside, but it was held that the proposed evidence could not be taken. But, if the attempted examination was irregular, there would have been no necessity to consider whether the evidence ought to be adduced was or was not admissible. It is sufficient, perhaps, to enable me to dispose of this matter, but I venture to point out that a great deal of time would be saved and the recovery of the plaintiff be accelerated if the examination to proceed. For it may turn out when these witnesses come to be examined they will prove negative what the defendant hopes to prove. It would cause no more harm to the plaintiff from the evidence being taken on an examination than if the witnesses had made affidavits. In neither case can the examination be used without the leave of the Divisional Court. I therefore propose for them to consider how far the principle of Rule 498 is a new trial if the evidence of the proposed witnesses appears to be admissible, and sufficiently likely to lead to a different conclusion from that arrived at on the

argued as a reason for setting aside the appointment. The defendant's affidavit was not filed until after the proposed examination. That, however, does not appear to be a condition precedent. It might be a valid objection that it does not state that the proposed witnesses will not make affidavits. But from the nature of the evidence expected to be given by them, it is to be assumed that they do not wish to appear as

The motion will be dismissed with costs to the defendant until the Divisional Court, unless otherwise ordered. The examination should be stayed until the time allowed from this order has expired.

Plaintiff appealed from this decision in Chambers.

W. E. Middleton, for plaintiff.

R. McKay, for defendant.

ANGLIN, J., allowed the appeal with costs of the appointment, holding that Rule 491 applies to appeals and motions in the nature of appeals governed by Rule 498, and that fresh evidence adduced upon the pending motion or application to the Court except by leave of the Court is not allowed.

CARTWRIGHT, MASTER.

NOVEMBER

CHAMBERS.

CANADA SAND LIME BRICK CO. v. [illegible]

*Mechanics' Liens — Statutory Proceeding to Enforce
Time for Filing Statement of Claim —
Long Vacation.*

Motion by defendants the owners to dismiss the claim under the Mechanics' Lien Act and vacate the writ. *lis pendens*.

W. A. McMaster, Toronto Junction, for plaintiff.

R. G. Agnew, Toronto Junction, for defendant.

THE MASTER:—Four objections were taken to the proceedings, but of these it will only be necessary to mention one, as the others might be cured by amendment.

The one which appears to be fatal is that the statement of claim was filed too late. It was conceded that it was so, unless the time of the long vacation was taken into account in reckoning the 90 days prescribed by the Act. This, however, cannot be allowed in the absence of authority to that effect. The Act requires the proceedings to be commenced within 90 days from the date the work done. But, if the long vacation is taken into account at certain times of the year this period is doubled and enlarged from 90 days to 180 days.

as I can see, the Rules of the Court do not in this apply to the Mechanics' Lien Act. For, although the in an action under this Act is called a statement it differs materially from the pleading of that in ordinary action.

it is the first step in a proceeding to enforce a remedy—and this step the Act itself expressly re- be taken within a fixed period. To extend that excluding the vacations would be in effect to amend and materially enlarge the time which must elapse oceedings under it will be barred.

tion must be dismissed, and the certificate of lis vacated. . . .

HT, MASTER.

NOVEMBER 1ST, 1907.

CHAMBERS.

ODIST CHURCH v. TOWN OF WELLAND.

— *Statement of Defence — Motion to Strike out
aph—Action for Negligence Resulting in Destruc-
Fire of Plaintiffs' Buildings — Insurance Moneys
lication in Reduction of Damages — Objection in*

ction was brought to recover from the defendants o the amount of \$15,000, caused to the plaintiffs struction of buildings by fire resulting from the f the main which supplied natural gas to the users n.

aintiffs alleged that this breakage was caused by ent use of a heavy steam roller by the defendants.

th paragraph of the statement of defence was as The defendants by way of counterclaim further he said church and contents were insured for the ,000 or thereabouts against loss or damage by fire, unt of insurance has been or will be paid the plain- er owners of the said property, and the defendants d, in the event of being held liable for the amount

of damage sustained, to receive the benefit of such insurance and to have the same applied to such damage."

The plaintiffs moved to strike out this part of the defence, on the ground that it "is immaterial and tends to prejudice the plaintiffs in the fair trial of the action."

H. E. Rose, for plaintiffs.

C. A. Moss, for defendants.

THE MASTER:—In support of the motion the Toronto Industrial Exhibition Association, 2 O. R. 1075, 6 O. L. R. 635, was cited. That case, was in point. There the allegation by the plaintiffs that the defendants had insured themselves against liability from the use of the machine in question was one of the material facts on which the plaintiffs relied. Here the plaintiffs are asking to have a part of the defence struck out, on the ground that the facts therein cannot be given in evidence at the trial.

Since the judgment in *Stratford Gas Co. v. The City of Stratford*, 10 O. R. 407, approving the decision in *Glass v. Grant*, 10 O. R. 480, it is but seldom that a defendant's defence is interfered with in Chambers. According to the principle laid down in *Glass v. Grant*, supra, this should be done "unless the pleading is so plainly frivolous and vexatious as to invite excision." Is that the case here?

Doubtless *Brown v. McRae*, 17 O. R. 712, is a case like the present "the defendants cannot recover the amount of damages to be paid by them to the plaintiff from insurers in respect of the loss of the machine." p. 714. From this it would seem probable that the defendants here could successfully demur to this defence. However that may be, in *Knapp v. Carley*, 7 O. R. 187, it was pointed out that no application for summary judgment is to be made. It is not to be heard except by a Judge in Court. Following the lead of the learned Judge in that case, I do not have the power to give effect to the motion, which I therefore dismiss without prejudice to any application for summary judgment or otherwise, after reply, which plaintiffs may make.

Costs in the cause.

AN, J.

NOVEMBER 1ST, 1907.

WEEKLY COURT.

RE McRAE.

*Instruction—Life Estate — Power of Appointment to
in Fee—Debts Due by Devisee of Life Estate
d against Property Devised — Charge against Life
only.*

by David Haigh McRae and Norman J. Fraser, ex-
the will of William Ross McRae, under Con. Rule
ec. 91 of the Judicature Act, for the determination
stion arising in the administration of the estate of
oss McRae, and affecting the rights and interests
isees under his will, namely: Is the indebtedness of
Duncan McRae, charged against him in the testa-
s at his death, by the provision of the testator's will
against the fee simple of the property devised for
William Duncan McRae, being the centre portion of
ing 22 feet on Princess street, in the city of King-
only charged against the life estate of William
McRae in that property?

Whiting, K.C., for the executors.

McIntyre, K.C., for Ernest J. B. McRae and Jessie
two of the children of R. W. R. McRae.

Farrell, Kingston, for W. D. McRae.

ndell, Kingston, for the official guardian.

ANON, J.:—The testator died on 19th April, 1901,
de his last will dated 31st January, 1885.

use 4 the testator devised the centre portion of lot
fronting 22 feet on Princess street, in the city of
measured in an easterly direction from the easterly
mid west part, and comprising the centre house on
known as "the Pantry store," to his son William
McRae for his life.

stator devised to several of his sons and daughters
operties in the city of Kingston for the respective
their natural lives.

y the 11th clause of his will the testator directed
n and after the death of any of my said sons and
I devise the land hereinbefore devised for life to

such son or daughter to my said trustees in fee simple of the children of such son or daughter and of the issue of as he or she shall by will appoint, and in default of appointment in trust for such children in equal shares, with power to the trustees for the time being of the trust to lease or sell any land which they shall so hold, and to invest the proceeds of any sale in manner hereinafter mentioned, and apply the income of the share to which each such children shall be presumptively entitled to the maintenance and education during his or her minority, and to pay such share to him or her on attaining majority.

The testator by a codicil dated in October 1900 altered his will as follows:—

“I hereby alter and amend my said will as follows:—My son William Duncan McRae shall be charged with all and all sums of money in which he may be interested at my decease, or which then stand charged against him by books, and remain unpaid, and whether barred by the Statute of Limitations or not, and all such moneys are to be paid against any and all the property, real and personal, now or bequeathed to him, and the benefits he may receive by will, and shall be deducted therefrom and paid to him, that he shall only receive the balance remaining after such deduction or payment.”

William Duncan McRae was at his father's decease indebted to him in the sum of \$11,870.35.

The parcel of land devised by the 4th clause of the will to William Duncan McRae for life is the only parcel of land devised to him, and the fee simple thereof is now in his amount of his indebtedness.

The other beneficiaries under the will of the testator, in so far as indebtedness of William Duncan McRae is concerned, are the said parcel in fee simple, and not merely on the basis of the therein devised. William Duncan McRae is now the guardian, acting for his children, and the indebtedness is charged only on the life estate of William Duncan McRae in the property.

The beneficiaries interested under the will of the testator are William Duncan McRae, Walter Ross McRae, Ernest McRae, Jessie Riddell McRae, David Haig McRae, Haddin McRae, and Margaret Angelique McRae, all of full age, and their children are all infants, and are under the care of the official guardian, who has also been a trustee, and present any unborn grandchildren of the testator.

Jordan v. Adams, 6 C. B. N. S. 748, John Jordan (paragraph 5), executed in 1825, devised certain land in the county of Warwick to his son William for life, and after his decease to the "heirs male of his body" for their natural lives in succession according to their respective seniorities, "or in such parts and proportions, and in such order and form, and amongst them, as the said William Jordan, his heirs and assigns, shall by deed or will duly executed and confirmed, direct, limit, or appoint." It was held by the Court on Pleas that "by heirs male of his body," as expressed in the context, testator meant sons, and consequently William Jordan took only an estate for life. In the Exchequer Chamber, 9 C. B. N. S. 483, Cockburn, C. J., and Brett, J., affirmed the judgment of the Court below, and Martin, B., and Channell, B., held that William Jordan took an estate for life.

In the present case the testator by the 4th clause of his will gives only a life estate to his son William Duncan, and as to the remainder, he simply gives to his son William Duncan McRae a power to appoint amongst his heirs.

I think, clear that William Duncan McRae takes a life estate in the property devised to him, and the interest in the property to his father is only chargeable against such estate.

The parties are entitled to costs out of the general assets of the testator—those of the executors to be as beneficiaries and client.

J.

NOVEMBER 1ST, 1907.

TRIAL.

MCCULLOUGH v. HUGHES.

and Purchaser—Contract for Sale of Land—Offer in Writing—Acceptance—Administrator of Estate—Consent of the Court—Specific Performance—Perjury.

to compel specific performance of a contract for the sale of certain land.

James, Barrie, for plaintiff.

Hewson, K.C., for defendant.

RIDDELL, J.:—The defendant is administrator of the estate of Mary Hughes. He determined to sell the land belonging to the estate, and, the leave of the official guardian having been obtained (this being necessary as a lunatic being interested), the land was offered subject to a reserved bid.

Before this time the plaintiff, who had been in possession of the land, had, as I find, given up possession of the land, although he kept a few articles upon the premises, in possession of the plaintiff.

The reserved bid was not reached, and the plaintiff made a bid at the sale, and defendant, went to the office of the defendant's solicitor, and, after considerable conversation, the plaintiff offered the sum of \$1,400 for the land, which was accepted by the defendant, but, as it was less than the reserved bid, which had been fixed by the official guardian, the plaintiff was informed that the consent of the official guardian must be obtained. He said that he must have the money at once or not at all, and the solicitor wrote on the back of the conditions of sale, which the plaintiff had, the following:

The defendant accepted this offer, so far as the land was concerned, and signed below the offer of the plaintiff:—

"I think the above offer should be accepted by the defendant, Mary Hughes, administrator."

It was arranged then and there that this offer should be sent to the official guardian with a letter asking the official guardian to telegraph the plaintiff on receipt of the offer was to be accepted.

This took place on Saturday 1st June, 1900. The defendant now pretends that he does not remember the place on the Saturday in the solicitor's office, and that he or must have been intoxicated. This, I find, is a very slightest foundation in fact—and I find that he was not competent to do business and thoroughly understood what was doing and intended to do it. On Monday 5th June the official guardian telegraphed to the plaintiff accepting the offer on behalf of the lunatic—whereupon the defendant telephoned to the office of the official guardian that he had received an offer for \$1,500. Before the receipt of the telegram the plaintiff had done a little work on the land, but had stopped—and he awaited the receipt of the telegram to take possession and do substantial work on the land, as a fact that he did take possession on the Saturday.

of the official guardian and the contract which the defendant had made so far as he could, on the Saturday

if the writing of the defendant be not a signing of the contract or in itself an acceptance of the offer, parol evidence is enough: *Boys v. Ayerst*, 6 Mad. 316; *Flight v. Russell*, 4 Russ. 301; *Warner v. Wellington*, 3 Drew. 523; *Picksley*, L.R. 1 Ex. 342; *Lever v. Koghler*, [1901] 1 Ch. 1.

And therefore the contract was complete so far as the defendant was concerned. It is true that it was completed upon the acceptance of the official guardian; but there is no term express or implied that the defendant should have a locus pœnitentiæ until after the acceptance by the official guardian. Whether the defendant might have withdrawn from the contract by notifying the plaintiff before the acceptance by the official guardian had been communicated to him, I need not consider. He did nothing of the kind and said nothing to the plaintiff until the evening of the Monday, when he indulged in expressions the reverse of complimentary to the plaintiff, to his own solicitors, and to the official guardian; and said the contract was no good.

Now I consider how the case would stand if the defendant had in fact received a more favourable offer for the property, being as it does to an estate, though, as at present I do not think the Court would sanction the disavowal of a fair bargain deliberately entered into, though that were by an executor in the interest of an estate. There is no credible evidence that any such offer was made—I decline to hold anything proved which rests upon an unsupported oath of the defendant.

If the defence fails, and the usual judgment for specific performance will be made with costs. The defendant will be ordered to pay his estate for the costs the plaintiff is entitled to, and will not be allowed his own costs against the estate.

The necessary result of my findings is that the defendant committed wilful and corrupt perjury. I, therefore, request the County Crown Attorney to institute proceedings against him. This crime seems to be alarmingly on the increase, and all legitimate means should be taken to punish and thereby prevent its repetition.

NOVE

DIVISIONAL COURT.

PETERBOROUGH HYDRAULIC CO. v.

*Landlord and Tenant—Action for Rent—Clas
—Agreement between Tenant and Bank—l
ness — Authority of Agent of Bank—Assu
lities—Implied Obligation to Pay Rent
Lease — Power of Bank to Carry on Bus
Obligation—Third Parties.*

Appeal by the Ontario Bank, third par
ment of BOYD, C., ante 109.

The appeal was heard by FALCONBRIDGE
J., RIDDELL, J.

J. Bicknell, K.C., and G. B. Strathy, fo

D. O'Connell, Peterborough, and G. N.
borough, for defendants.

F. D. Kerr, Peterborough, for plaintiffs.

RIDDELL, J.: In drawing
judgment the Ontario Bank, the third party
to pay to plaintiffs both the sum of \$765.82
defendants and the plaintiffs' costs ordered
defendants, and also to pay the defendants t
action, so far as they relate to the claim fo
costs of the third party proceedings.

The third parties appeal from the judg
merits, and also contend that in any case no j
be entered against them in favour of plaintiff

The circumstances under which the defe
demnity from the Ontario Bank appear in
judgment given by the Chancellor. I am,
to agree in the conclusion at which he has ar

Whatever may have passed between Mc
fendants in Toronto, the agreement between
and the bank was reduced to writing—the
considered by the solicitor for the defendant
think any case has been made out for reform
that the documents are binding upon the ba

liability under the documents and facts of the case upon the Ontario Bank. . . .

On September, 1905, an agreement is executed reciting that the McAllister Co. are indebted to the bank in the sum of \$69,200 as part security for which sum the bank has advanced money under sec. 74 of the Bank Act, and also an assignment of all the company's book debts and other claims, inasmuch as the company are unable to pay the bank in full. A recital is that it has been agreed that upon payment of the sum of \$10,000 and the absolute surrender of all the assets, the bank assuming payment of certain debts set out in a memorandum attached, the bank shall release the company and the individuals thereof from all liability in respect of said indebtedness. Then comes the operative part of the instrument: "The company hereby assigns to the bank all their" assets, etc. 2. The company shall forthwith pay to the bank \$10,000, "the bank to discharge the payment of certain of the company's liabilities particularly set out in the memorandum hereto attached." 3. Further assignments and assurances. 5. The operation whereof the bank, etc.

The agreement of even date referred to in paragraph 5 recites that C. B. McAllister should carry on the business of the company for the bank under the supervision of the local manager of the bank; and by paragraph 6 the bank agreed to indemnify the company and the members thereof against any liabilities incurred while the business was continued in the company's name.

The bank admittedly did pay the recited indebtedness and the rent and all other liabilities the company became liable for during the time the business was so carried on—namely, it carried out the express provisions of the two agree-

ments. I do not think that any indemnity can be implied. It is apparent that the agreement to assign the lease was entered into for the advantage of the bank, and might have been waived—and that the company could not have compelled the bank to accept an actual assignment of the lease even if the consent of the landlord had been obtained, if it was not. And this is especially the case when it is doubtful that such transaction could be lawfully entered into by the bank. See R. S. C. 1906 ch. 29, secs. 76, 77, 82.

Therefore, the expressed indemnity should in this case,

I think, exclude any indemnity to be implied intended that the bank should indemnify against the documents should have, and would be provided when providing for other future indemnities.

It was in effect admitted upon the argument that the cases cited make it clear—that, unless by express agreement indemnity to be implied, the bank cannot be held liable. The question as to whether and in what contract indemnity stated contract is to be implied has received much consideration. Long before the leading case of *Aspdin v. The Bank of Montreal*, 671, the matter had been considered by the courts of this country. It would serve no good purpose to cite the cases, adopting as I do the language of Lord Macmillan in *Ogdens v. Nelson*, [1903] 2 K. B. 287, where he says: "The other line of authorities establishes that where the parties have made a contract which contains a variety of stipulations and is silent as to indemnity, no stipulation or agreement which is not expressly made can be implied, unless it is necessary to give to the contract the effect and efficacy which both parties must be supposed that it should have."

[Reference also to *The Queen v. Demme*, 103, and *Hill v. Ingersoll Road Co.*, 32 O. R. 103.]

I am of opinion, therefore, that the claim against the bank should be allowed, the claim against the bank should be allowed, the costs to be paid by defendants, and that judgment for the costs of this motion be given to the plaintiffs and defendants.

FALCONBRIDGE, C.J., and BRITTON, J.
reasons stated by each in writing.

RIDDELL, J.

NOVEMBER 1903

TRIAL.

BOYLE v. ROTHSCHILD

Company—Directors—Breach of Trust—Sale of Shares to Company—Consideration—Shares in Company—Contract—Selling aside Transaction—Value of Machinery.

Action by one Boyle and the Canadian Yukon Mining Co. against the Detroit Yukon Mining Co. and

both companies, to set aside a transaction where machinery belonging to the defendant company to the plaintiff company, in consideration of \$500,- of stock in that company allotted as fully paid to individual defendants, and for other relief.

Neshitt, K.C., and A. H. Clarke, K.C. for plain-

Cassels, K.C., and R. F. Sutherland, K.C. for

L. J.:— . . . The plaintiff Boyle received from Her late Majesty, 5th November, 1900, of certificate bearing lands in the Yukon Territory. After and on 27th June, 1904, he made an agreement with Detroit Yukon Mining Co., whereby he agreed to transfer this lease to that company for \$750,000. in certain instalments mentioned, the last on or before November, 1907. As the property was by this time in the name of H. B. McGiverin, of Ottawa, as the money (except the down payment of \$7,500) was paid to McGiverin.

Arrangement fell through, the defendant Rothschild, resident of the Detroit company . . . informed plaintiff Boyle that it would not be carried out (see 7th August, 1904.) Boyle had certain machinery and property, and some work at least was done by him.

Letter already spoken of Rothschild suggested the formation of a new company to take over the "Boyle concern, after considerable negotiations at Ottawa, an agreement was entered into, 14th September, 1904, between McGiverin and Rothschild and his co-defendant whereby Rothschild and Murphy undertook to form and incorporate a joint stock company to take over the lease. Understood"—so says the document—that the company to be formed should be capitalized at \$750,000, of which \$50,000 should be used by Rothschild and Murphy to purchase machinery for the operation of the company, and the balance should be given in stock to Boyle as part consideration for the transfer by him to the company of his rights in the lease.

And the balance of the consideration was to be paid to Boyle in cash \$250,000 by the company from time to time out of the gross output of the company's mining opera-

tions at the rate of 25 per cent. of the g
It will be seen that the new arrangement c
from the former—the consideration is di
are different.

It is contended by the defendants that
the arrangement—an understanding betw
that certain machinery owned by the Detro
be taken over by the new company at.
and that the \$500,000 mentioned in the c
applied to the purchase of that machinery
only is such arrangement or understanding
upon such of the evidence as I believe, is
proved. I give credence to the evidence o
McGiverin and decline to accept the eviden
the defendants to the contrary. My con
they are upon the conduct and demeanour
the box, would be strengthened, if they nee
(which they do not), by the fact that in t
charter made to the authority at Ottawa,
defendants Rothschild, Murphy, Moran,
by McGiverin (McGiverin signing as trust
expressly stated that the stock subscribed
was "to be paid for by the transfer to th
lease No. 18 . . . in favour
. . . according to the terms of an agree
between said . . . McGiverin and .
the provisional directors of the company
September, 1904;" while it is said that "th
for by the said . . . Joseph Murphy
. . . Dwyer and . . . Rothschild i
cash." Each of these defendants subscri
as did one Palms, not a party to this acti

I do not believe that these defendants
any such document if it did not set out th
believe that they would or could have over
provision for payment by the transfer o
stock subscribed by McGiverin, and the ec
vision for the payment in cash of the stock
them. They are men of business, and it i
and I do not believe, that if the arrangement
set up, the document could have been sent
at Ottawa in the form already mentioned
that the defendants did not at that time

to the government of Canada, and that the application states that the \$500,000 stock was to be paid for

as the impression I had formed at the trial. Mr. [redacted] offered as evidence certain parts of the examination [redacted] of Rothschild (who is now dead) in an action [redacted] O'Brien. I rejected the evidence, but, on careful [redacted] on, I think that I—to avoid the necessity or possibility of a new trial in case I should be held to have been [redacted] my view of the admissibility of the evidence—I [redacted] admitted the evidence, subject to objection. I [redacted] to understand upon what principle this can be [redacted] but, for the reason I have given, I have now allowed [redacted] to be put in, subject to objection and quantum [redacted] A perusal of this evidence has not in the least [redacted] or modified the impression I formed at the trial, [redacted] with this evidence, I find as I have done.

[redacted] But, there was an understanding in advance of [redacted] in [redacted] that the machinery owned by the Detroit company [redacted] be taken over by the new company, but it was to [redacted] over at a fair price, and to be paid for out of the [redacted] of the company, to be paid in in cash by the 5 subscribers [redacted] payment for their stock.

[redacted] It is possible that the defendants have since that time [redacted] themselves believe that this meant or implied the payment [redacted] 0,000 in stock for it—but nothing of the kind was [redacted] intended by the plaintiff or McGiverin, or said by [redacted] defendants or any of them, or any one acting in their [redacted] There never was any arrangement or understanding [redacted] that the stock other than that to be allotted to [redacted] should be paid for otherwise than in cash.

[redacted] The articles of incorporation were issued to the new company [redacted] name of "The Canadian Klondyke Mining Company, [redacted] Limited," 2nd October, 1904; in the charter it was [redacted] that the defendants Rothschild, Murphy, Moran, [redacted] and also Palms and McGiverin, should be the provision- [redacted] directors, and the company were authorized to issue [redacted] stock to McGiverin in consideration of the transfer [redacted] of mining property to the company. In the meantime, [redacted] the granting of the charter, the plaintiff and McGiverin [redacted] made an agreement with the Canadian company and [redacted] gentlemen mentioned, "who are nominated as provision- [redacted] directors of said company and act herein as trustees there- [redacted] of, to transfer the property on being allotted

\$250,000 in stock of the company, and the promise of the company to pay the \$250,000 been agreed upon.

A meeting of the new company for was held 25th October, 1904, in Detroit, the provisional directors except McGiverin the routine business McGiverin said that been subscribed for in cash, and that the deal with the machinery. He also said it would have an independent valuator appointed to value the machinery contemplated to be sold. Rothschild said that a full statement of the same was prepared and laid before the directors.

The machinery stood in the books of the company at \$181,854.67, and was at the time of the sale a fact, \$50,000.

After this time the affairs of the Canadian company were managed by the 5 persons named; McGiverin took part in the management of the company. On or about 5th December, 1904, caused to be sold to themselves, in the manner to be hereafter referred to, 250 shares of stock, shares in the company to the amount of \$250,000 each, and to McGiverin \$250,000. The last part of the agreement and in accordance with the provisions of the charter—the others were without exception. The persons named were guilty of a fraud of which they were the directors and trustees. They had, no doubt, conceived the idea and carried out of procuring the whole amount of available capital of the Canadian company in exchange for the Detroit company.

It is now time to go back a little. The facts of the case of the defendants that, after the decision of the court, the company (of which they were members and directors) would not carry out the agreement of 1904, Rothschild, Murphy, and an attorney, also a director, were appointed by the Detroit company to go to Ottawa and see if a deal could not be made with Boyle in reference to the machinery, and it is asserted that the 5 persons who were named for the charter were acting throughout for the benefit of the company. No entry is to be found, as is admitted, of the Detroit company of any such appointment. The court does not consider it important whether the facts

that may be, on 5th December, 1904, what was it was this—the 5 were credited with \$100,000 as such in the books of the company, but the certificates were issued to the shareholders of the Detroit pro rata. Nothing had then nor has since been done with this stock; and I find that it was and is wholly the defendants, being directors and trustees of the company, are liable for this breach of trust. I have not, expressly to decide whether they are liable as subscribers for stock, and whether they may not plead that they are relieved from personal liability as trustees under sec. 32 of 2 Edw. VII. ch. 15, which was then in force (R. S. C. 1906 ch. 79, sec. 31.) I present advised, I do not think that the defendants are exempt themselves of that section. See the cases cited in *Joint Stock Companies*, pp. 135, 136. I, therefore, think that the Court has power to order the defendants to pay to the company the amount of their subscription. In my view I take of this case, it is not necessary to so. I am of opinion that the defendants are liable in breach of trust, it necessarily follows that each is liable for the whole damage—and in this case I think each must pay to the company the whole amount of the damage of the shares he caused or assisted in causing to

be a trite law—it depends on elementary propositions of jurisprudence, and authorities need not be quoted—books are full of cases bearing on the matter.

One having even from perusal of decided cases a general acquaintance with the methods of "high finance," might have been prophesied with reasonable confidence and accuracy. Slightly modifying them, I apply the words of Lord Macnaghten in *Gluckstein v. Barnes*, L. R. 10 C. at p. 248: "For my part, I cannot see any novelty or any novelty in the trick which" the defendants played on the plaintiff, who held one-third of the shares of the company. "It is the old story. It has been done before and over again."

That these defendants were directors and large shareholders in the Detroit company, given that the Detroit company had machinery that they may not have been too stupid to retain, given that a new company had been formed which did not need this machinery, and did undoubtedly need machinery, given that these defendants were also the

governing and controlling body in the new company. There was a want of appreciation on their part of the common honesty towards the new company, and as the night the day that they will try to transfer to the new company the machinery of the old company, they will take of all the available stock in the new.

All these conditions were fulfilled, and the plaintiff was allowed. It is true that the plaintiff was told that he was to get \$750,000 for which he was at one time to get \$750,000 of the same stock and \$250,000 in cash, but he did not do that. They had the power and on the 4th January, 1905, a bill of sale was made by the plaintiff company to the Canadian company for the machinery of the machinery already referred to for consideration of \$500,000. McGiverin had resigned in 1904, ceased to be trustee for the plaintiff company, and was succeeded by Mr. Smylie, secretary of both companies. In the form of instrument which should pass between the plaintiff company and the Canadian company for the sale of the machinery. "I know," says Mr. Smylie, "I know that the plaintiff company is to sell the machinery to the Canadian company for \$500,000, and I know that a cheque is to be drawn on the plaintiff company in any other form of legal document necessary to effect transfer? If so, what?" To which the plaintiff replied that "it might perhaps be wisest to have the machinery transferred from the one company to the other company for whatever consideration has been agreed upon. I therefore enclose herewith draft form which may be subject to some slight differences of fact as better understood by the directors of the plaintiff company. The bill of sale was drawn, executed, and the machinery transferred.

There never was any agreement that the plaintiff should be taken for \$500,000 in cash or in stock. The directors of the Canadian company were not present at the sale of the Detroit company, and the pretended sale was made designedly in fraud of the Canadian company, its largest shareholder. It might be said that the plaintiff, guilty of this fraud would be shocked to hear of the plaintiff thus bluntly described, but that is the fact.

The plaintiff did not know of this transfer until after. Though he saw a copy of the bill of sale, he did not know that it was intended to turn in the plaintiff's price of \$500,000. Even now his only objection of the Canadian company.

this objection is a most righteous one. I do not say of the subsequent proceedings anything to pre-Canadian company recovering from these defendants the action brought by the plaintiff and discontinue the alleged resolution of the company ratifying of the directors. If there were no other reason, action was passed by those who had no right to vote; no shareholders (see 2 Edw. VII. ch. 15, sec. 72), indeed, it could be considered that my holding directors are liable as for a breach of trust in having stock issued, made those to whom it was issued shareholders. But, even then, such a resolution would be and is of the company and of the plaintiff.

I would not omit to state that 2 placer mining claims, numbered 20, were also on 26th June, 1905, assigned by the Canadian company to the Canadian company for "\$1 of money and other valuable considerations." The value was respectively \$5,000 and \$10,000, in all \$15,000; alleged that these also were assigned to the Canadian company in part satisfaction of the \$500,000. This is a fraud a little less glaring, but not much. The Canadian company turn over machinery worth \$50,000 and worth \$15,000, in all \$65,000, in payment for stock \$100,000.

Coming to my conclusions of fact, I have been able to rely wholly upon the knowledge, the accuracy, and the honesty of the plaintiff, the witness McGiverin, and the witness Readgold. Judging these by their demeanour in court, I say their evidence should be given the fullest weight, and the same remark applies to Mr. Hayden and Mr. Bell. In the case of some at least of the witnesses for the defence, I fear that "the wish was father to the deed"—at all events I prefer, for the reason I have given, the evidence of those already named.

It will be a declaration that at no time before the formation of the Canadian company was there any arrangement that the machinery, etc., of the De Beers company should be taken in exchange for \$500,000 in the Canadian company, or should be bought by the Canadian company for \$500,000 or any other sum; that the value of the machinery at the time of the transfer to the Canadian company was \$50,000 and that of the placer claims was \$15,000; that the stock of the Canadian company, with the exception of that issued to McGiverin, is wholly unpaid;

that the defendants other than the Detroit company were liable to the company as for a breach of contract for \$500,000; that the alleged sale to the Canadian company for \$500,000 was in fraud of the said Detroit company; that the defendants (other than the Detroit company) were liable therefor to the company; that there was no compensation or reparation therefor to the Canadian company by the sale of the said machinery, claims, etc., but that the sum to be paid therefor was not fixed; that the Canadian company should pay to the Detroit company the value of the said property fixed as above (upon consent of the parties) or the value may be fixed by the Master, or I may direct that the defendants should pay the costs of the said action. If a reference be had, I reserve to myself the right to award further costs and further directions.

MULOCK, C.J.

NOVEMBER 1897

TRIAL.

KELLY v. ELECTRICAL CONSTRUCTION

Company—Election of Directors—General Meeting—Shareholders—Proxies—Rejection — By-law—Ontario Companies Act—Voting — Majority — Election.

Action to set aside the election of the directors of the defendant company and for other relief.

T. G. Meredith, K.C., and J. W. G. Winkler, plaintiffs.

G. C. Gibbons, K.C., and G. S. Gibbons, defendants.

MULOCK, C.J.:—The company were incorporated under letters patent issued on 17th March, 1897, under the provisions of the Act respecting the Incorporation of Companies by letters patent, R. S. O. 1887 ch. 104, in virtue of sec. 5 of the Ontario Companies Act, 1897, and the provisions of secs. 17 to 105 of that Act.

February, 1907, the annual meeting of the share-
the company was held, for, amongst other pur-
election of a board of 5 directors. A poll was
d on the conclusion of the voting the chairman
Messrs. Campbell, Workman, Gorman, Heman, and
ected, and they have ever since acted as members
rd.

aintiffs contend that they and C. W. Sifton, and
nan, Gorman, Heman, and Thomas, were elected,
ring this action on behalf of themselves and all
holders, except the individual defendants, and ask
e election set aside, and that defendant Campbell,
hairman at the meeting, be ordered to declare the
nd C. W. Sifton to have been elected directors, or
aration that the plaintiffs and C. W. Sifton were
d in the place of the other individual defendants.
defendants, including the defendant company, by
ment of defence contend that plaintiffs are not en-
maintain this action, and that the election was con-
accordance with the requirements of the by-laws of
ny.

stance of the plaintiffs' complaint is that the
defendants are usurping the office of directors, to
on therefrom of the plaintiffs and C. W. Sifton.
he evidence does not, I think, shew that a majority
as tendered in support of the plaintiffs and Sifton.
ore the case is narrowed down to the one point,
e election should be set aside at the instance of
tiffs.

directors were not duly elected, their usurpation of
invasion of the rights of the corporation to man-
own internal affairs.

ection of directors is a matter under control of a
f the shareholders. If the majority are satisfied
resent board should remain in office until the ex-
f the statutory term of office, no useful purpose
served by unseating them, for it would at once be
er of the majority to restore them to office.

management of a company's domestic affairs the
frequently err as to the manner of doing what the
re entitled to do, as, for example, by doing irregu-
legally what they have the right to do in a regul-
l manner. In any such case, the majority of the
rs may waive such irregularity or illegality, and

it would be purposeless for the Court to enquire at the instance of individual shareholders of the propriety of a transaction of the company, when the next meeting of the majority of the shareholders might in substance confirm the former action, though in a manner not binding. For instance, what purpose would be served by setting aside an election of a board of directors if the majority of the shareholders were opposed to it? It could at once render it nugatory by re-electing the same members?

To avoid such fruitless litigation, the principle laid down in *Foss v. Harbottle*, 2 Hare 461, Mozley 790, and later cases, is well established, that an act within the powers of the company, and confirmed by the majority of the shareholders, will not interfere at the instance of individual shareholders. Therefore, I think that, unless the plaintiffs can show that the act is not the act of the company, the suit should be dismissed. It is, I think, a good principle that should be given an opportunity for obtaining the consent of the board. The board might give it, or it might be given from the shareholders in some manner, as at a special general meeting convened under the provisions of s. 52 et seq. of the Companies Act.

The company are at present parties to the action. The necessary parties either as plaintiffs or as defendants are before the Court, and have taken part in the proceedings. Therefore, it is advisable, I think, to have no legal effect at this stage to the defendants' objection to dismissing the action, I should, conditional upon the action being amended as above indicated, dispose of the merits.

It appears that the dispute as to the result of the election has arisen in consequence of 4 absent shareholders not being represented at the meeting by proxy, not having voted. If they had been, the plaintiffs could have succeeded. C. W. Sifton would have been elected. The other shareholders were E. Holden, the holder of 1 share, C. W. Sifton, the holder of one share, C. W. Sifton, the holder of one share, and G. Gerrard, the holder of 44 shares.

It was shewn that J. B. Campbell, with 7 shares owned by Messrs. Olmstead and that Thomas Dealy was the holder of 1 share, and he had pledged to the Dominion Bank. and

plaintiffs that under sec. 36 of the Ontario Companies Act was entitled to vote in respect of these 20 shares by proxy.

Votes cast for the different candidates, not counting those presented by the 4 proxies hereafter referred to, were as follows: for D. J. Campbell, 177 votes; for Workman, Heman, and Thomas, 121 votes each; and for each plaintiff and C. W. Sifton, 56 votes. Deducting the improperly counted for Campbell, Workman, Gorman, and Thomas, there would still remain in their favour 70 votes for Campbell and 114 votes for each of the others, leaving these 4 in a majority of 58, and the plaintiffs cannot overcome this majority without counting the votes of Gerrard and at least 14 additional votes.

In the determination, therefore, of the question, it is unnecessary to deal with any special question growing out of the case of Thomas Dealy or Charles Sifton.

Following are the circumstances in which the votes of absent shareholders were disallowed. E. J. Sifton, in his possession the written proxies of the 4 absent shareholders, took them to the company's office the day before the election for the purpose of registering them, and he there showed them to Mr. Reeve, the company's bookkeeper and clerk, who appeared to be in charge of the office, his duty was to register the proxies, and for that purpose he handed them to Mr. Reeve. The latter not appearing to know what to do with them, Sifton told him to stamp them with the company's stamp, to date the transaction, and to mark them as proxies. Reeve did as desired, and then handed them back to Sifton, who, placing them in his pocket, took them away. At the election the next day Sifton produced the 4 proxies and presented them to the chairman of the meeting, contending that the persons in whose favour they were drawn were there-fore entitled to vote for the absentees. The chairman undertook to do so, otherwise, on the ground that the proxies should have been presented with the company the day before the election, and that by an alleged by-law of the company, which is in the following words: "All instruments appointing proxies shall be deposited at the head office of the company at least one day before the date at which they are to be used."

In their statement of claim plaintiffs contend that, inasmuch as this by-law seeks to restrict the unqualified right to vote conferred on the shareholders by sec. 63 of the Ontario Companies Act, it is ultra vires and void.

At the trial the minute book of the company inclusive, was put in, shewing certain by-laws in the words of that in question, passed by the directors on 13th May, 1897, and the defendants what purport to be certain by-laws adopted by the company at the adjourned annual meeting held on 5th February, 1907, which include in their number one in the provisions of the by-law above quoted, respecting voting by proxy.

Before the close of the evidence, I called the counsel to the provisions of sec. 47 of the Companies Act which, as regards voting by proxy, seem to entitle the shareholders to adopt only such by-laws respecting proxies as have been passed by the board of directors since the last annual meeting of shareholders held next before that of the company, and counsel for the defendants thereupon produced the directors' minute book for such by-law, but none was found.

Section 77 of the Companies Act requires the company to cause proper books to be kept, containing minutes of the proceedings of the board of directors and of the general meetings of the company duly authenticated. This implies that the minutes must be in writing. If, therefore, there exists a by-law passed since the annual meeting of the company immediately preceding that of 16th May, 1907, the company, being in control of the company's books, should have been in difficulty in producing it, and from its non-production I assume that none such exists.

The first question to determine is whether the by-law respecting proxies passed by the board of directors on 13th May, 1897, or any by-law, was in force at the time of the directors held on 5th February, 1907.

Section 47 of the Companies Act declares that the directors may from time to time make by-laws for the regulation of the company, (e) "the requirements as to proxies" . . . by-law . . . unless in the meantime confirmed at a general meeting of the company duly called, the by-law shall only have force until the next annual meeting of the company, and in default of confirmation the by-law shall from that time only, cease to have force, and no new by-law to the same or the like effect shall have force until confirmed at the general meeting of the company.

The directors' by-law of 13th May, 1897, was confirmed at the next annual meeting after its passing, and it ceased "to have force." The only kind of

tion by the shareholders under the provisions of sec. in force at the time of such annual meeting. Thus w in question not being in force at the time of the meeting of 16th May, 1905, was not capable of con-, but the shareholders at their annual meeting of , 1905, purported to pass a by-law in the exact lan- that of 13th February, 1897, respecting proxies; and ntended that if the shareholders' by-law did not s a confirmation of the directors' by-law, it could be l as a by-law originating in the first instance at a ers' meeting; and that, irrespective of the statute. holders had inherent power to pass it, as a piece tic legislation necessary for the proper carrying on airs of the company.

contention, I think, cannot prevail. The presump- a corporation have implied power to pass by-laws for the proper management of their affairs arises he absence of express power. Here the Companies res what powers, in respect of proxies, shall be en- a corporation subject to its provisions, and therefore on here is not what powers arise by implication, but the powers of the corporation having regard to their atutory powers.

63 of the Companies Act enacts that "at all gen- ings of the company every shareholder shall be en- as many votes as he holds shares in the company. vote by proxy;" and sec. 47 declares that the board rs may pass by-laws regulating the requirements as s. These two sections must be read together, their ng that each shareholder is entitled to the right y proxy, subject to one qualification, namely, com- ith the requirements of a directors' by-law, which, nfirm within the time limited for that purpose. exist.

n 47, empowering directors to pass by-laws respect- es, impliedly withholds such power from the gen- of shareholders. As stated by Vaughan, B., in Rex ood, 7 Bing. 1, "wherever a charter confers an ower of making by-laws, as to a particular subject. ain part of the corporation, more especially as in those terms are very general and comprehensive. o ground on which a presumption can be raised of d power existing in the body at large, but that such xpressly taken from that body according to the rule

expressum facit cessare tacitum." Were it there might in the present case be in existence previous to the election two inconsistencies passed by the board of directors, the other holders, prescribing conflicting regulations. It cannot, I think, be seriously argued that I contemplated such a possibility. I am, therefore, the express power conferred by sec. 47 upon directors to pass by-laws respecting proxies is at large of any inherent power to deal with therefore the shareholders' by-law of 16th May, 1897, regarded as originating with that body, is null and void. The directors' by-law of 13th May, 1897, confirmed by the shareholders within the time specified in sec. 47, also became null and void. The plaintiff's statement of claim attacks the by-law of 16th May, 1897, and the directors' by-law of 13th May, 1897, that it was merely a shareholders' by-law. The point came up for consideration at the trial. The plaintiff's agents unsuccessfully endeavoured to discover a by-law to serve as foundation for the shareholders' claim.

I, therefore, see no reason why the plaintiff should be allowed the benefit of the point, and this point is not entitled to raise it formally by amendment of claim.

It would thus seem that when the election of 1907, was held, there existed no by-law regulating the requirements as to proxies introduced at the meeting being in themselves inconsistent with the regulations, entitled the holders to vote on behalf of the constituents thereof. This they were not permitted to do. The votes which they represented were sufficient to elect the 4 directors whose elections are now challenged. It was clear from the evidence that these votes were cast and for whom, it would be possible to declare the result of the election. The evidence, however, does not afford reasonable certainty indicate for whom these votes had been cast, and I therefore have no sufficient basis upon which to amend the election return. All that the evidence discloses is that the holders of proxies were not permitted to vote at the meeting for the purpose of voting, but, the court ruled that the proxies would not be recognized. The court instructed the scrutineers not to accept votes from the holders thereof, such action resulted in their claim being rendered useless to press further their right.

not been denied them, they would in all probability and the result of the election might have been different. In such a case the election should be set aside: rel. *Davis v. Wilson*, 3 U. C. L. J. O. S. 165; rel. *McManus v. Ferguson*, 2 U. C. L. J. N. S. Therefore, conditional on the plaintiffs obtaining leave to use the name of the company as parties plaintiffs, in a reasonable time amending their statement of making the company plaintiffs instead of defendants, giving the formal amendments to the statement of claim on such change, the election of the defendants Gorman, Heman, and Thomas should be set aside, the election had.

I think, be expedient that the 4 directors in should continue in office until the election of their The parties may be able to agree upon a date for holding the election, the same to be stated in judgment, otherwise I shall have to name the date. If the plaintiffs fail, within a reasonable time, to obtain authority in the company's name and to make the necessary amendment, the defendants may, on 24 hours' notice, bring evidence of such failure before me on affidavit or other evidence and in the meantime no formal judgment to be entered. This is not a case calling for any order as to costs.

NOVEMBER 2ND, 1907.

C. A.

RE BECK MANUFACTURING CO.

*and Watercourses—Logs Floated over Stream—Tolls
Summary Order Fixing — Past Tolls — Mandamus—
County Court Judge—Refusal to Entertain Application
for Tolls.*

by the Beck Manufacturing Co. from order of a
County Court (9 O. W. R. 193), dismissing their appeal
order of MABEE, J. (9 O. W. R. 99), dismissing a motion
for a mandamus requiring the Judge of the District
Court at Nipissing to hear evidence on behalf of the appellants
for the purpose of fixing tolls which the appellants

might charge in respect of logs driven on township of Nipissing, in 1902 and 1903 order fixing such tolls under R. S. O. 1897 J., and the Divisional Court felt bound by Divisional Court in *Re Beck Manufacturing Lumber Co.*, 3 O. W. R. 333.

The appeal was heard by Moss, C.J.O. MACLAREN, and MEREDITH, J.J.A.

A. B. Morine, for the appellants, contended in support of the decision of a Divisional Court in 3 O. W. R. by *Beck Manufacturing Co. v. Ontario Lumber Co.*, 12 O. L. R. 163, 8 O. W. R. 35, or should be.

G. F. Shepley, K.C., and A. G. F. Lawton, for the respondents, contended that the Divisional Court Judge and the Ontario Lumber Co.

MEREDITH, J.A.:—No new light has been thrown on the main question involved in this case; and I do not wish to add to it that is in any sense new; but I do wish to say that which the statute confers is a toll, and not a duty, and too late to make and enforce a toll a day or a week, or speak of a week, a month, a year, or year and a day, and that a fair toll is a toll-traverse, that is, a toll for the owner of land for the use of it; whilst the statute confers a toll-thorough only, that is, a toll in respect of a toll-thorough made in a highway, and so a toll against a toll-thorough.

It is, of course, right to say that the proper question for the main question depends upon a proper interpretation of the enactment. But that is merely taking the word "toll," which must be immediately retraced, for the word "toll" confers a "toll," and we must at least give the word its meaning for knowing the meaning of the word and the word it said in using it, just as we should if we used the word "compensation" instead, which would be to desire us to substitute for it, without any excuse, for the whole provisions of the Act are inconsistent with the creation and enforcement of compensation in the ordinary sense. And the word "toll" confers is obviously a toll-thorough and not a toll-traverse. Of all tolls which were ever granted, or ever granted by Parliament—innumerable though they have been—one has never heard of such a claim as is made in this case. It has been made in regard to it—to give it force and effect before it was fixed, before it existed?

t this very claim prove itself without the meaning
 h as the enactment covers? The Act contemplates
 respect of which the tolls are claimed being seiz-
 force payment, and makes elaborate provisions ac-
 Here they are not, but have long since ceased to
 indeed, if such a claim as the plaintiffs make be
 to, there is nothing to prevent it being enforced,
 tolls fixed and actions maintained, not only after
 ve passed away, but even after they and the im-
 in respect of which the tolls are claimed have
 rotted away, and the means of fixing the tolls have
 become obscured.

ne that the Act gives a lumberman a right to have
 xed, but it does not require him to thus disturb
 gs. That provision is for his benefit, not to im-
 y on him. There may be hundreds or thousands
 s in which no claim to a toll is intended to be
 as been ever thought of, and rightly so. Is he to
 such and in effect insist upon them taking a toll?
 is not difficult to suggest a case in which the pro-
 d be beneficial if not indeed necessary to him.
 nstance, a costly improvement on which it was
 tolls would be claimed; it might be necessary to
 e autumn at latest what the tolls would be. The
 s whole prospects might depend upon that. The
 he improvements might purposely delay having
 either to prevent others, by reason of the un-
 ompeting in the purchase of logs in the district,
 rage the purchase by appearing to have no desire
 ts in order to be able to exact the more; and then,
 reshets of the following year, have them fixed and
 the highest rate, to the upsetting of the lumber-
 lations and to his great loss. In such a case he
 r early or abandon the field. To let him go on
 nd then come down upon him is to make some-
 a trap of the enactment.

pellants' position is precisely the same as if they
 improvements in a highway of the ordinary kind
 them a right to a toll-thorough. What would be
 an attempt to enforce by action "tolls" for the
 improvement before—not to mention years before
 were fixed and without any sort of notice of any
 er to demand a toll or have a toll fixed?

thing, of course, depends upon my construction of the being accepted, for, if it is not, if it is the proposition that the Divisional Court had jurisdiction to make the order, that is an end of the matter. But, as I do that the Divisional Court acted without jurisdiction, it is, I think, clear that the order is no answer. Only be, on the footing that the matter is *res judicata*, it was really so put on the argument before us. Surely elementary, if anything can safely be called that in order that a matter should become *res judicata*, the Court must have jurisdiction to make the order or judgment in question: *Regina v. Hutchings*, 6 Q. B. Attorney-General for Trinidad v. Eiché, [1893] A.

Divisional Court had, as I have said before, simply in appeal to alter, vary, or set aside the toll fixed by the County Court Judge. No one but him could in the future fix a toll at all, applicable either to the past, present, or the future. And neither he nor the Divisional Court had anything to do with the *liability* of any one to pay the toll, or indeed with anything else than the mere rate. The application goes back to him, if it does, he may, on considering the matter on the merits, refuse the application, or may fix the rate too high or too low. And an appeal, of course, lies from what he does to a Divisional

Court. I think the appeal should be allowed and the application dismissed with costs.

NOVEMBER 7TH, 1907.

C. A.

BARBEAU v. PIGGOTT.

— Machine — Repairs — Lien for — Contract —
 Value of Machine — Reasonable Sum for — Possession —
 Implied Contract of Letting — Implied Contract to Pay
 Reasonable Value of Use — Amount Expended in Repairs.

by defendant from judgment of a Divisional Court (O. W. R. 234) affirming judgment of MULOCK.

C.J., at the trial, in favour of plaintiffs. that while engaged in the construction of the Goderich Railway in May, 1906, defendant was in possession of a certain steam shovel, the plaintiffs; and they sued in trover. Defendant, by agreement the shovel was leased to him for repair, and he claimed a lien thereon. The shovel was seized by plaintiffs under a replevin order given declaring defendant entitled to a lien for a reasonable sum for the use of the shovel, and that upon payment of the difference he would be entitled to possession of the shovel.

The appeal was heard by Moss, C.J.O. and MacLaren, Meredith, J.J.A.

W. M. Douglas, K.C., for defendant.

W. M. German, K.C., for plaintiff.

MEREDITH, J.A.:—Both at the trial and on appeal the Court it was found that there was no completed agreement for the hiring of the steam shovel. The action never got beyond the stage of negotiation. In the meantime the defendant had been given possession of the shovel and had been authorized to have it repaired at the cost of plaintiffs. All this was done in a mistaken notion that a completed agreement would be reached.

The findings to which I have referred are supported by the evidence; the bargain such as that the shovel to make was never consummated. The plaintiffs were therefore, entitled to the possession of their shovel. The negotiations ended, and the only question remaining was as to the respective money rights.

One of the Judges of the Divisional Court found that there was an implied contract of hiring the shovel until the hire would amount to as much as the value of the shovel. But I can find no evidence to support this. However convenient it might be. It is quite clear that the parties ever intended to enter into no contract and contracts are to be implied according to the intention of the parties.

The trial Judge was of opinion that the defendant was entitled to a lien upon the shovel for the amount of the repairs.

pay him for the repair of it; but I am unable to per-
v that can be.

position of the parties according to law seems to me,
to be simple, and their several rights plain. The
are entitled to be paid for the value of the use
the defendant had of the shovel, upon an implied con-
pay for it what its use was worth during the time he
use of it. The defendant was not to have the use
nothing, he was to pay the hire of it, and, no sum
being agreed upon, he must be held to have impliedly
to pay a reasonable sum for the time during which
the use and benefit of the machine. On the other
the plaintiffs are liable to the defendant for the amount
expended by the defendant in the repairs, as money
him for the use of the plaintiffs at the plaintiffs'

result, in a money sense, based upon such legal
just the same as the result, in the same sense, arrived
Divisional Court and at the trial, and so this appeal
is dismissed.

R. J.A., gave reasons in writing for the same con-

C.J.O., GARROW and MACLAREN, JJ.A., concurred.

NOVEMBER 2ND. 1907.

C.A.

BARTHELMES v. CONDIE.

*Insolvency — Assignment for Benefit of
Creditors—Right of Creditor to Rank on Estate—Owner's
Interest in Mortgagee of Insolvent's Business—Evidence
of Creditors—Conduct—Estoppel.*

by plaintiffs from judgment of a Divisional Court
(R. 806) reversing the judgment of the trial Judge,
dismissing the action with costs. The action was brought
to establish that defendant was not entitled to rank upon
the insolvent estate of George Dodds, trading under the name

of the Prince Piano Co., in respect of a claim for a mortgage for \$4,530. The trial Judge ruled in favour of the view that one Cockburn was the actual owner of the Prince Piano Co.; that defendant was not the owner or representative of Cockburn; and that the judgment of the trial Judge was invalid and void. The Divisional Court held that by the evidence of Cockburn, supported by the conduct of all the persons who were from time to time in actual possession of the property, and having the books kept by them and all the recorded evidence, and to the entire absence of the element of fraud, the case made by plaintiffs was completely displaced.

The appeal was heard by Moss, C.J.O. and MacLaren, Meredith, J.J.A.

W. D. McPherson and F. D. Byers, for the appellants; J. Bicknell, K.C., and W. Assheton Smith, for the respondents.

MEREDITH, J.A.:—There is no solution of the ownership of the business at all as the whole evidence as that adopted and given to the Divisional Court.

Cockburn's interest in it and all his actions were consistent with such a solution, or else his interest in Dodds, who is his wife's father, a piano maker, and who is said to sometimes help himself from carrying on the business in this manner.

The trial Judge seems to me to have failed in treating the case as the ordinary one of a person carrying on business in the name of another to save it from his creditors. In such a case the amounting almost to need, has much weight, and was entirely wanting. Cockburn was in good financial position, and could, to better financial advantage, have carried it on in his own name. It can be said that the avoidance of the debts of the business proved unsuccessful, was a sufficient motive for carrying it on in the name of others, even at the risk of their own if it proved successful. But this is quite inconsistent with Cockburn's conduct in the business, which was such as to lead some to think the business was really his. There was no concealment of his interest in it.

documents, which are not a few, and some of which very formal character, the books and all the writings, any slip or exception, are consistent with the story of Cockburn, which is in no sense an improbable one, absolutely and entirely inconsistent with the claim of the plaintiffs, supported, as it substantially is, by the testimony of the husband of Prince, the partner; and, besides, there was a quite sufficient motive, honest motive, for what was done by Cockburn, which strongly supports his

view. The weight of evidence, it seems to me to be quite sufficient to properly reverse the findings of the Divisional

if that were not so, I am unable to perceive how they could succeed in this action, how it is open to them in this action that the business was not that of Prince & Dodds. To them they gave credit, and they always treated them as their debtors. They never made any claim against Cockburn, though they knew of Cockburn's interest in the business concerning the business; and, finally, they sued for judgment against Prince & Dodds, and their claims in this action are based upon that judgment. If the business were Cockburn's, they had no right to rank the estate of Prince & Dodds; they had no interest in Cockburn were their debtor, there would be no need of any estate; the debt could be recovered from him. The plaintiffs have made no effort to vacate their judgment against Prince & Dodds and proceed against Cockburn; and, if it would, doubtless, have been held to be too late: see *Ex parte Graham*, 26 O. R. 361, and the cases there referred to. It cannot be permitted to blow hot and cold; to say, for the purpose of getting their dividend, that the business was of Prince & Dodds, and then, for the purpose of getting Cockburn sharing in the estate as a creditor of the business, urge that the business was not that of Prince & Dodds but was that of Cockburn.

If the business was that of Prince & Dodds, then unquestionably Cockburn's claim is a valid one; it can be defeated by shewing that it was not their business but was his; but it has not been shewn, nor is it, in my opinion, open to the plaintiffs to shew it.

It was nothing objectionable, in point of law, in the judgment made payable to the defendant in this action, substituting him as trustee for Cockburn; nor in the defendant

proving the claim against the Prince & Dodge, under some circumstances such a thing might be held against the good faith of the claim; but in the present case it was out of the question. It was not an isolated case, but a trust, but was in accordance with Cockburn's decision in similar cases, and for his business convenience the claim in the defendant's name would not be likely to create suspicion. Nothing turns upon whether the sale is good or bad according to whether the business was conducted by not that of Cockburn.

I would dismiss the appeal.

OSLER and MACLAREN, JJ.A., each gave the same conclusion.

MOSS, C.J.O., and GARROW, J.A., also con-

Nov

C.A.

STEEN v. STEEN.

*Execution—Sale of Land by Sheriff under
Person who has Acquired Rights of Execution—
Irregularities—Lis Pendens—Advertisement
tion of Land—Sale at Undervalue—Notice
Conduct of Sale — Ratification of Sale
Debtor—Participation in Proceeds.*

Appeal by plaintiff from judgment of W. R. 65, dismissing with costs an action by plaintiff against defendant of certain land by the sheriff of the County of Glengarry, under an execution against the defendant. The action was brought on the ground that it was alleged by plaintiff that there were irregularities in the sale; that the sale was fictitious and void, and plaintiff asked that the sale and the sheriff's certificate be set aside; and that it should be declared that the land was held simply as security for \$3,500, and might be allowed to redeem.

appeal was heard by MOSS, C.J.O., OSLER, GARROW, EN, MEREDITH, JJ.A.

MacLennan, K.C., for plaintiff.
Smith, Cornwall, for defendant.

DITH, J.A.:—Through a series of errors and the excessive cunning the defendant has, I think, acquired a title to the land in question against the plaintiff, her

plaintiff was unquestionably the owner of the lands in question, having acquired them under the will of her father John. The suggestion that the defendant and other sisters had some sort of right to or claim upon the land or through their said brother, is wholly unsupported by anything which appears in the evidence in this case. The contrary is indeed made plain enough.

The defendant, in order to defeat or delay a creditor for a large amount of money in Montreal—the plaintiff intended and endeavored to convey the lands in question to the defendant and her sisters, but, through some unaccountable error, the lands were so inaccurately described that the deed did not cover these lands at all, but covered only lands which the plaintiff did not own.

Through some unaccountable error, this creditor brought an action against the 4 sisters to set aside the deed, to correct that fraud, and to recover judgment against the plaintiff for the amount in which she was indebted to the creditor. It is said to have been about \$7,000.

The settlement of that action by the defendant in this action, so far as she is concerned, was effected with the plaintiff in it. Apparently yet in error as to the effect of the settlement between the sisters, the creditors of the plaintiff, the plaintiffs in that action, accepted from the defendant in this action \$3,500 in settlement of it, and agreed to pay to her the balance of their claim against the plaintiff in this action when they had disposed of some property as security for it and had applied the proceeds on

They also agreed to allow the defendant in this action to prosecute that action to judgment against the plaintiff in this action in their name, and to assign such balance to the defendant in this action when so recovered. The balance that may remain owing thereunder." The writing evidencing this settlement are not as

clear as they might be; but there seems the defendant in this action was to take the judgment for her own benefit; and I am enough in the transaction to prove that through it in any sense a trustee for respect.

The action was carried on and judgment it against the plaintiff in this action for and the claim to set aside the conveyance in this action to her sisters was struck "without costs and without prejudice" by any party."

Writs of execution were issued, and in question were, in the usual course, under the writ against lands, and were defendant for a price which was not very u a sale, but was really considerably less value.

Several objections were made in respect of the sale; and some of them, no doubt, might have been better done; but at present I am prepared to say that any of them was such a sale, and it is not necessary to further upon sufficient evidence, the trial Judge, plaintiff, with a full knowledge of all the facts, acquiesced in that sale and received of it.

It is contended that the receipt of such money was by the plaintiff, but was by the solicitors during the sale proceedings, and who the objections to such proceedings which are made by those who are also her solicitors in this action. The trial Judge has found to the contrary, and in support of such finding; and upon the whole the action plainly failed, as this appeal also.

OSLER, J.A., gave reasons in writing in support of his conclusion.

MOSS, C.J.O., GARROW, and MACLAREN

NOVEMBER 2ND, 1907.

C.A.

BURNS v. CITY OF TORONTO

*Non-repair — Open Excavation Unguarded—In-
Person Crossing Highway—Liability of Municipal
tion — Negligence—Lawful Obstruction—Substi-
tuting Crossing Provided—Injury Due to Negligence of
Injured.*

by defendants from an order of a Divisional Court
(1907), setting aside the judgment of RIDDELL,
on the action, and directing judgment to be en-
titled to the plaintiffs and directing a new trial for the purpose
of damages only. The action was brought to re-
quire damages for injuries received by the plaintiff Ethel
Burns (co-plaintiff William C. Burns) on 15th
June 1906, by falling into an open sewer in Queen street
City of Toronto, near Kippendavie avenue. Plain-
tiffs alleged negligence of defendants in not securely guard-
ing the same. The trial Judge found that the whole cause
of the accident was the neglect of the plaintiff Ethel Burns
in not seeing where she was standing and where she was going.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW,
and MEREDITH, JJ.A.

For, for defendants.

For, for plaintiffs.

J.A.:—If the plank crossing or footway from the
north side of Queen street leading to the west side of
Kippendavie avenue was allowed to be in use by the public
while the sewer was being constructed, for access to the north
side of the street railway, so that people might there take
trains and cars or go across Queen street to Kippendavie
avenue, the fact that it was unguarded by a hand rail or some
other thing of that kind to prevent them from falling into the
excavation beneath it, would have been some evi-

dence of negligence, and it would have been the defendants had intrusted the work of digging a sewer in the street to a contractor: *Patterson v. Urban District Council*, [1898] 2 Q. B. 272 (C. A.) But the evidence is quite sufficient of the facts, and shews that while the sewer was at this point people were not intended to stop their cars there, the ordinary means of access to the north sidewalk of Queen street being obstructed by the earth thrown out of the excavations, and another street crossing being provided for the street crossing a little further to the east, the usual stopping place for cars approaching from that direction. The plaintiffs crossed the cars by crossing from the north sidewalk to the south, probably could not have done so except by climbing over the heap of earth. She crossed from the south side of Queen street to the approaching car, and then reached the sewer which the sewer had been carried, but was injured by the work and in the condition which was apparent to every one, was lawfully obstructed and intended to be used by the public. The cases within the cases already decided in this Court, *City of Toronto*, 22 A. R. 371, and *Atkinson v. City of Toronto*, 24 A. R. 389. On this ground, as well as of her own negligence, to which it must be added, rather seems to have been due, the plaintiffs.

We have not the advantage of knowing what the Divisional Court to reverse the judgment but I am obliged to say that, in my opinion, the judgment was right, and that the appeal should be dismissed with judgment at the trial restored, and with costs to the plaintiffs.

MEREDITH, J.A., gave reasons in writing for his conclusion.

MOSS, C.J.O., GARROW and MACLAREN

NOVEMBER 2ND, 1907.

C. A.

IREDALE v. LOUDON.

*of Actions—Real Property Limitation Act—Title
 of Upper Storey of Building with outside
 and Staircase—Declaratory Judgment—Injunction
 restraining Defendants from Interfering with Possession
 of Portion of Building — Support and Means of
 Easement.*

by defendants from judgment of MABEE, J., 8 O.
 in favour of plaintiff, in an action for a declaratory
 plaintiff was the owner in fee of "the workshop
 street" on the west side of Bay street, in the city
 known as street No. 186, together with the land-
 staircase leading to the workshop, the same having
 of about 13 feet, 6 inches, on the west side of Bay
 for an injunction restraining defendants from
 upon these premises, and removing or damaging the
 thereon, and from wrongfully interfering with the
 the detriment of plaintiff. MABEE, J., held that
 tion of plaintiff was sufficient to extinguish the
 defendants to the upper floor of the building, as well
 e of ground at the foot of the stairs, being 3 feet
 et and 5 feet deep, and enjoined defendants from
 altering, pulling down, or in any way dealing with
 on of the building in question in such a way that
 ion, use, and enjoyment of the upper floor, stair-
 landing occupied by him should be interfered with
 ially affected.

peal was heard by MOSS, C.J.O., OSLER, GARROW,
 REN, JJ.A.

McPherson, for defendants.

Tilley and R. H. Parmenter, for plaintiff.

r, J.A.:— . . . It is not in dispute that, sub-
 plaintiff's claim, if any, the defendants are the
 fee simple in possession of the land in question,
 the plaintiff's only title is one acquired under the
 Limitations by length of possession.

The premises consist of an up-stairs shop, access to which is had by a door opening off the street, admitting to a small passage 4 feet by 5 feet, from which ascends a staircase in the workshop and affording the only access thereto. The landing is about a foot above the sidewalk, and is enclosed by boards down to the ground. There is no basement beneath the shop. The outer door has a lock and key, and the plaintiff has the habit when leaving the shop of locking the door and retaining the key. That door and the landing were only used in connection with the workshop, and nothing above the workshop but the roof. There are no sheds or store-houses, and throughout the proceedings the defendants by their tenants have occupied the lower storey, as well as the rest of the premises, forms part, and have always paid the taxes on the whole.

At one time the plaintiff had an interest in the premises which the workshop forms a part, as tenants of the defendants, but many years ago he sold his interest to the defendants. And thereafter the defendants took possession of the workshop, which before was used as a tin-shop, paying rent at irregular intervals to the defendants at the rate of \$6 per month. This was made in October, 1890.

It was contended by the defendants that the workshop was the correct position as to the workshop, that the way must be regarded merely as a way, or an easement. That view is not, in my opinion, correct. The way, outer door, landing, stairway, and workshop, I think, formed part of one and the same premises. The outer door which the plaintiff usually locked was in fact the outer door of the shop, and the workshop and all should stand or fall together.

It was also contended by the defendants that during the absence of the plaintiff in July, 1899, during which the defendant Thomas Iredale took possession, interrupted the running of the business against this contention. Upon leaving the premises the plaintiff requested his brother Thomas Iredale, to occupy the premises for his business for him during his absence, upon which the plaintiff agreed, and upon the plaintiff's return, the defendant Thomas Iredale

His occupation during the 3 weeks could at most inured for his own benefit, and not for that of his common, the other defendants (R. S. O. 1897 ch. 11), and he would, under the circumstances, be from claiming that his occupation was other than nant, or at least of agent for the plaintiff.

Upon the main question I think the defendants are to succeed. The plaintiff was tenant of the prech he now claims down to the last payment of rent, 1890. At that time, if at all, the statute began in his favour: see R. S. O. 1897 ch. 133, sec. 6. The consisted of the room upstairs and the stairway and s, and also necessarily of the support afforded by storey or ground floor. Without that there could stairs room. And it is clear that unless the plain- w able to make good his right, whatever it is, e lower floor, or soil, as well as to the upper floor, must wholly fail, for it would be absurd to hold s acquired a title to the upstairs room alone, which defendants might immediately destroy by pulling walls of the lower storey. A claim wholly "in the without reference to the soil or surface could not under the statute.

el for the plaintiff fully recognized this difficulty, y strenuously contended that the plaintiff had ac- right not merely to the upstairs room, but to this support, as part of the parcel of which he had been d referred, among other authorities, in support of ation to the well known case of Dalton v. Angus, s. 740.

are, however, at least two sufficient answers to the contention: (1) the right to support is at most an and 20 years' possession would be required to bar dants; and (2), if not an easement but land, then er was a moment since October, 1890, when the an be said to have had anything in the nature of ve possession of any part of the lower floor. The s, the owners, were in actual possession of the soil e storey during all the time, and therefore at the e plaintiff's possession was merely a joint posses- them. As said by Lindley, M.R., in *Littledale v. College*, [1900] 1 Ch. at p. 21: "In order to ac- the Statute of Limitations a title to land which has owner, that owner must have lost his right to the

land either by being dispossessed of it or by having discontinued his possession of it." See also *Sherren v. Pearson*, 14 S. C. R. 551, 585; *McIntyre v. Thompson*, 1 O. L. R. 163; *Smith v. Lloyd*, 9 Ex. 562; *Russell v. Romanes*, 3 A. R. 635; *McConnachy v. Denmark*, 4 S. C. R. 609, 632. How can it be said that the defendants had been at any time dispossessed of or had discontinued possession of the lower storey or of any part of it? The supports of the upper floor were simply the walls and partition of the lower floor.

Dalton v. Angus was the case of adjoining owners, and can have no application unless we are prepared to place the plaintiff in the same favoured position as if he was a purchaser for value of the upper floor, in which case there might well be an implied covenant, or even possibly an implied grant of the necessary easement of support. No such implication can be made in the plaintiff's favour: see *Wilkes v. Greenway*, 6 Times L. R. 449. The question here is one of title, and not of rights which spring from an acknowledged or a proved title.

As said by Lord Chancellor Cranworth in *Roddam v. Morley*, 1 De G. & J. at p. 23, "I should be very unwilling to give encouragement to the notion that there is of necessity anything morally wrong in a defendant relying on a statute of limitation. It may often be a righteous defence. But it must be borne in mind that it is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment."

This is a case of a plaintiff asserting a right, and not merely defending himself from attack under the statute, and, applying Lord Cranworth's language, I am of opinion that the plaintiff has utterly failed to prove, with any degree of strictness whatever, that his possession, such as it is, of the premises in question, is of the kind or character contemplated by the statute, to operate as to bar to the legal title of the true owner.

Reliance was placed by counsel for the plaintiff upon the cases of *Rains v. Buxton*, 14 Ch. D. 537, and *Midland R. W. Co. v. Wright*, [1901] 1 Ch. 738. But these are decisions upon facts which in no way resemble those in question here. In *Rains v. Buxton* the land in question was a cellar of which the claimant or his predecessor in title had been in possession for over 60 years, and of which it was held upon the evidence the owners had discontinued possession. And in *Midland R. W. Co. v. Wright* the land in question was the surface

of railway land through which passed a tunnel occupied by the plaintiffs as part of their railway. The plaintiffs were in possession at least of the underground part occupied by the tunnel, and being in possession of part might well have been considered to be in possession of the whole. The decision is that of a single Judge only, upon the special facts then before him, and can have no overruling effect upon the numerous authorities both in England and Ontario, to some of which I have referred, that the possession required by the statute is an exclusive one. But, in any event, what was successfully claimed in that case, under special circumstances, was the surface, and therefore the claim was wholly unlike the one now in question.

Appeal allowed and action dismissed with costs.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and OSLER, J.A., concurred.

NOVEMBER 2ND, 1907.

C. A.

BOWERMAN v. FRASER.

Vendor and Purchaser—Contract for Sale of Land—Condition — Representation — Agency—Non-compliance with Terms — Action for Specific Performance — Refusal of Court to Adjudge.

Appeal by defendant from judgment of BRITTON, J., ante 229, in favour of plaintiff in an action for specific performance of an agreement for the sale of land on the south side of Bloor street, in the city of Toronto, by defendant to plaintiff.

J. W. McCullough, for defendant.

S. H. Bradford and E. G. Morris, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.:— . . . The plaintiff's agreement in the form of an offer to purchase was described, signed by him on 2nd February in the presence of one McTaggart, a real estate agent, and acceptance thereof signed by defendant on 3rd February in the presence of one Ponton, another agent, and afterwards delivered to the plaintiff by the defendant. The defendant refused to carry out the agreement, and that a condition or stipulation, on the part of the only McTaggart was authorized to part with the property, had been complied with, and on the furtherance of the agreement being by its terms of the essence of the contract, the defendant was in this respect also in default.

It appeared that Ponton was defendant's agent for the sale of the property in question. The plaintiff going to McTaggart as his agent, and not to Ponton. McTaggart at first applied to a plaintiff's agent, he then supposed, the defendant's agent, and told him that Ponton was the agent, he came to the plaintiff by telephone, offering \$40 per foot for the property, \$50. and plaintiff told McTaggart he would accept \$45. McTaggart then prepared the offer, and signed, offering that sum. Finding that the offer was not accepted, plaintiff authorized McTaggart to offer \$46, and Ponton. McTaggart, and the plaintiff on February met at the latter's office, and in the course of a discussion which took place there McTaggart, by his authority, added 25 cents per foot more to the offer. The defendant agreed to, and the offer was then altered by substituting the sum agreed on for the sum previously named therein, and the defendant signed the offer on the printed form at the foot. It is in my view I take of the case, to refer to the facts. The Plaintiff was purchasing the property for the defendant, and defendant, not being satisfied of his own ability to carry out the agreement by making payments in accordance with the terms stipulated that it was not to be held until he had given his undertaking that his building operations not later than the middle of the month of April. The agreement was then entered into by McTaggart on these terms. McTaggart appeared before the court away a very inaccurate recollection of what had taken place, and told plaintiff that he wanted a letter from the plaintiff would soon begin to build. On 5th February

at effect, which he sent to Ponton on the over the agreement to plaintiff. Ponton McTaggart that the letter would not do, did not shew it to defendant, as it was not stipulated for. McTaggart said that he plaintiff again, but that, as he had already person an option to purchase, which was epted, . . . the undertaking would pro- essary. Nothing further came of this. The never in fact performed, and the defendant t. The trial Judge held that McTaggart was gent, and that, as the agreement had been o plaintiff, without accurately communicating rms on which only it was to become binding, was entitled to rest upon it without more— hort, the delivery by McTaggart as a delivery dant himself.

examination of the evidence, I am, with respect, dopt this view of McTaggart's position. It is le that there was some understanding between. McTaggart by which they were to share in any which might become payable if the sale should out, but neither that nor the fact that by ent the defendant was to pay the commission e McTaggart his agent if he was not really so. Taggart was employed by plaintiff to negotiate for ase on his behalf, and as clearly Ponton was em- defendant to sell. There is no evidence that de- ver employed McTaggart, or that Ponton was ever l to do or in fact did so. McTaggart was asked in ationship he stood to Ponton, and answered, gent, I suppose you would call me;" but, as plain- ed him for his, and Fraser repudiated him, I cer- ould not call him so. He probably derived his im- from the scandalous arrangement for dividing the ion, which could not affect the legal relation in s the evidence to my mind conclusively shews, he plaintiff. He received the agreement as plaintiff's on the express condition that it was not to be handed. the principal except upon the specified terms. Of rms the plaintiff through him had notice, and not e complied with them, he is not, in my opinion, entitled ice the agreement.

I think the appeal should be allowed and the action dis- with costs.

Nov

C. A.

BATTLE v. WILLOX.

*Contract — Construction — Advances —
Breach — Damages—Measure of—Pos-
sibility — Rejection of — Impossibility
Option—Partnership—Warranty—Jud.*

Appeal by defendant from order of a
9 O. W. R. 48, reversing order of ANGLI
4, allowing an appeal by defendant from
Master at Welland in an action for da-
mage of contract, and directing a reference to
assess damages upon a different basis.

The appeal was heard by MOSS, C.J.O.,
MACLAREN, J.J.A., and RIDDELL, J.

F. W. Griffiths, Niagara Falls, for de-
fendant.
W. M. German, K.C., and T. F. Batt
for plaintiff.

GARROW, J.A.:—The plaintiff and
defendant entered into an agreement in writing dated 8th
March 1914, whereby the plaintiff agreed to indorse pro-
vide the accommodation of the defendant up to
\$5,000, the proceeds to be used in the
excavation of a gravel pit owned by the defendant. in
which the defendant, among other things,
granted the plaintiff an interest in certain specific
land he then expected to make, but had not acquired.
The Canadian Niagara Construction Co., M.
Douglass, H. D. Symmes, and the Electric
Company, 5 in all, for the supply of sand.

The defendant afterwards made contracts with
the parties, namely, M. P. Davis and A. J. Davis,
for some reason failed to obtain contracts with
the three parties.

The plaintiff duly indorsed as agreed, and
received the proceeds.

the following month of December the defendant sold, and thus put it out of his power to perform the, of which the plaintiff was to receive the benefit. the proceeds of the sale, however, the promissory on which the plaintiff had become liable were taken the defendant; and the action was brought to recover by reason of the defendant's failure to procure out the several contracts in the profits of which the plaintiff was to share.

The action was tried before Meredith, J., who found for the plaintiff, and directed a reference to the Master at Wells to assess the damages.

On the matter coming before the Master, the defendant, disputing his liability in respect of the two contracts which he had secured, tendered evidence to shew that he had not secured the others, which evidence was rejected, and the Master proceeded to ascertain the damages on the footing that the defendant was liable in respect of the two contracts.

An appeal from the Master's report was heard before the Court, who held that the proper construction of the contract was that the defendant would procure and carry out the named contracts as could be obtained, *reference to Riddiford v. Watts*, L. R. 5 C. P. 577, and *Howell v. Wilson*, 1 Q. B. D. 258, and therefore that the evidence tendered was properly rejected, and he referred the matter back to the Master to proceed with the reference upon that construction of the agreement.

An appeal was taken to a Divisional Court, where the same conclusion was reached, *Britton, J.*, with whom *Judge, C.J.*, concurred, giving it as his opinion that the action was concluded by the formal judgment as given, and that in any event the defendant's covenant was absolute and unconditional. *Mabee, J.*, reached the same conclusion upon the question of construction, although he was of opinion that the question was open so far as the formal judgment was concerned.

Two questions are thus presented: 1st, as to the effect of the formal judgment; and 2nd, if it is open, as to the question of the proper construction of the agreement. The only embarrassment in the form of the judgment from the preliminary declaration "that the defendant was guilty of a breach of the contract . . . by reason of putting it out of his power to perform the same by

selling the sand or gravel pit . . . " reference in these words: "And this order that it be referred to the Master of the Bench of the Court of Judicature at Welland to assess the damages payable by the plaintiff by reason of the said breach of contract by the defendant."

No larger consequences should follow from the defendant's failure to perform by selling than from any other breach of contract. The measure of damages would remain the same. In not selling, the defendant had simply said "I cannot perform," he would still have been entitled to recover the damages. In assessing the damages the proper construction of the contract should be adhered to. And that is the principle properly assumed I think. He has failed to do so. He admits his liability as to the two contracts, but as to the others, "I could not get the land," he says. Absolutely and unconditionally agreed that it is, I think, clear that the learned trial judge's contention that such a contention should be referred to the Master. In the course of his reasoning the Master says, in reply to a request from counsel for the plaintiff on this subject to make some special directions, "I will leave the whole question of damages to be assessed by the proper officer. The defendant was not to enter into the contracts. It may very well be that if he had entered into them there would be no loss. If he had entered into them then comes the question of whether or not he was to be paid for them."

The matter was, therefore, in my opinion, properly left by Anglin, J., and Mabee, J., open in the hands of the Master, and the evidence should have been received in support of the other view that the contract is absolute and that the damages can be maintained.

And upon this branch I also agree with the Master. Anglin, J.

The whole agreement must, of course, be construed as it begins by reciting that the defendant is to enter into certain lands intended to be worked as a gravel pit. The defendant is to enter into certain contracts hereinafter mentioned for the supply to certain persons and corporations of the said gravel pit, that he had requested the plaintiff to pay him financially in the development of the said gravel pit, in carrying out the said contracts, to which the plaintiff agreed upon certain conditions. Then it is agreed that the defendant said Willox is to enter into contracts a

fore enumerated; 2nd, "that the plaintiff is to be indorser on promissory notes to the extent of \$5,000, the consideration whereof he is given the right to elect within three years after taking a one-fourth interest in all the property going out of the before-mentioned contracts, and to receive for \$5,000 a one-third interest in the gravel pit, and with a one-third interest in all the business from the date of the agreement, his position in the latter event to be that of partner with a one-third interest;" 3rd, "plaintiff to have a lien upon the lands for all moneys he may be bound to pay as such indorser, and any payment he may make to be allowed on purchase money in case he exercises the option to purchase a share;" 4th, "each of the parties to account to the other for all moneys received or expended in connection with the gravel pit during the term of the agreement;" 5th, "if either party desires to purchase a share or interest, the other to have the first option to purchase the same;" 6th, "each of the parties hereto agrees to abide by this agreement, to the best of his ability, according to the true intent and meaning of the same and to do all that may be necessary for the attainment of mutual benefit to the parties hereto."

A general rule, no doubt, is that where there is a contract to do a thing not in itself unlawful, the contractor must perform it or pay damages, although in consequence of unforeseen circumstances the performance has become unexpectedly burdensome or even impossible. See *Restatement of Contracts*, 7th ed., p. 410, citing *Taylor v. Caldwell*, 3 B. & S. 826. That was the case of a music hall which was to be let to the plaintiffs, but which before the day of the contract, without the fault of the party was destroyed by fire. The court held the defendants excused, and laid down the principle: "Where from the nature of the contract it appears that the parties must from the beginning have contemplated that the thing could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular thing continued to exist, so that when entering into the contract they must have contemplated such consistency of existence as the foundation of what was to be done, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a contract, but subject to the implied condition that the thing shall be excused in case before breach performance becomes impossible from the perishing of the thing, by the default of the contractor."

In *Clifford v. Watts*, L. R. 5 C. P. absolute covenant to dig and remove from the land demised an aggregate amount of not less than 1,000 tons of pipe clay a larger quantity than 2,000 tons of pipe clay each year of the term. In an action for breach of this covenant the defendant pleaded that he was not at the time of the demise nor since the demise had always been impossible, and that it was unknown to the defendant at the time of the demise that there were no reasonable means of knowing or ascertaining the quantity of pipe clay on the land. To this there was a demurrer, and the Court held that it was not a good defence, being of the opinion that the covenant, although absolute in terms, was not intended to be a warranty by the defendant that he would take any event pay the stipulated royalty, clay

principle was applied in *Appleby v. Myers*, L. R. 51; and in *Nickoll v. Ashton*, [1901] 2 K. B. 126. In the latter case *Vaughan Williams, L.J.*, dissented, but in the present case said: "The fact is that the answer to the question whether the obligation of the contract is dependent on the existence of some thing or combination of things at the time for fulfilment, or whether one party to the contract is dependent on the existence at that time of that thing or combination of things, is always a question of intention of the parties gathered from the contract as expressed, and the facts of the case." a quotation which, in my opinion, correctly states the point of view to be taken by the Court in such contracts. It is not enough to find a contract in absolute form, for in all the cases referred to the condition. But it must also be found that the defendant intended to warrant and did warrant expressly or by implication the happening of the event on which his liability is to depend, and that that was the intention of both parties to the contract. In the present case it is known to both parties that the contracts in question had not been entered into, and that without the consent of the other contracting parties no such contracts could be obtained. The defendant succeeded as to two of the contracts; upon these he does not dispute his liability, but as to the others he failed, it is to be assumed for the purpose of the law that he was exercising due diligence in attempting to secure the contracts; if it appears in the Master's office that the failure was due to his own carelessness, his liability would be the same as if he had succeeded: see *In re Arthur*, 14 Ch. D. 1. In the present case, under the circumstances, impliedly warranty certainly is no express warranty, that he would warrant to all, or pay damages in lieu of profits if he did not; the question is certainly one of some nicety. But, on the whole, and after much consideration, I am of the opinion that no such warranty can or ought to be implied, and that the true construction is that contended for by the plaintiff, namely, that what was in the contemplation of the parties was that the defendant would obtain the contracts as reasonably possible.

There are two alternatives provided for in the agreement: the first was that the plaintiff was to be entitled to a one-fourth share of the profits from the contracts; the other, at his option, to purchase a one-third interest in the gravel pit and in the business done or in prospect of being done.

after the date of the agreement. In the first case the plaintiff was to become a partner with a share of all business done from the date of the agreement. In the second case he would have been entitled to a share of the profits to arise from performing these contracts. In the third case, as a partner, to a one-third share of the profits of other contracts and business from the date of the agreement. Whichever option was exercised, the plaintiff was equally bound, if at all, to obtain the contracts. And, as applied to the circumstances of the case, it existed if the plaintiff had exercised the option instead of the first, and had become a partner in the business, it would be clearly unreasonable to suppose that the defendant had intended that the defendant should be entitled to the profits upon these contracts, if not obtained through no fault of his. The effect of the option was to give the plaintiff the benefit at the expense of the defendant, of these unearned profits as a partner's share of the profits to arise from the business of gravel to other purchasers, for probably the price of gravel it nowhere appears that the price to be paid for the contracts in question was in any way excessive. If the option had been applied to the circumstances to exist in the case, had been exercised, the contract was not void. In the same sense contended for by the plaintiff, I think the same language can be otherwise construed in the case of the first option.

Then what is the true meaning and effect of the 6th clause of the agreement before set out? It is to give all the clauses to which I have referred, the same force and receive its due meed of attention and for the purpose of the terms to apply to the whole agreement. It is not intended to limit in some degree the effect of the 6th clause (among others) the first clause, it has no effect. That is what I can see. The parties had in view the fact that they agreed to certain things. The solicitor who drew the agreement knew that it was wholly unnecessary for the defendant to perform already expressed obligations to do so, and in doing so introduced for the purpose of saving words "to the best of his ability." This clause may be applied, and I see no reason why it should not be applied to the first clause, in which the defendant was to perform the contracts in question, the result which,

authorities, I have reached, as already stated, would in a more satisfactory manner upon the express of the agreement itself.

deal in either view should, in my opinion, be all the matter remitted to the Master, as directed by

And the plaintiff should pay the costs of this of the appeals to Anglin, J., and the Divisional

and MACLAREN, JJ.A., concurred with GARROW, reasons stated by each in writing.

C.J.O., and RIDDELL, J., dissented, for reasons each in writing.

NOVEMBER 2ND, 1907.

C.A.

COOLEIDGE v. TORONTO R. W. CO.

*Cases—Injury to Passenger Alighting from Car—
Negligence—Contributory Negligence—Findings of Jury
Verdict.*

by defendants from order of a Divisional Court (No. 623) directing a new trial of an action tried by the Master, J., and a jury at Toronto, in which the findings in favour of plaintiff, upon which judgment was entered for her (9 O. W. R. 222). Action by Alice to recover damages for personal injuries sustained on reason of the alleged negligence of defendants in the operation of one of their cars, upon which she was riding on 7th September, 1906. She attempted to get on the car in Yonge street between King and Melinda, and the car, making it had stopped, and fell or was jerked off the ground, and badly injured. The appeal was allowed on the ground that a new trial should not have been ordered, and that the action should have been dismissed.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MEREDITH, JJ.A.

OSLER, K.C., for defendants.

MOSS, K.C., for plaintiff.

GARROW, J.A.:— . . . The negligence was based upon the statement of claim and relied upon as the negligence of the defendants' servants, while the plaintiff, by the act of alighting, caused the car to start for the plaintiff was thrown to the ground and injured.

In answer to questions the jury found that the defendants were guilty of negligence causing the accident, and that such negligence consisted in a failure of the defendant to get off.

In his reasons for judgment in favour of the plaintiff, these findings Britton, J., said the case was submitted to the jury upon the act of negligence set forth in the statement of claim, and that there had been argued upon any question of negligence of the conductor when the car arrived at the plaintiff's street, where the plaintiff desired to get off. The jury had found negligence causing the accident. It was, in his opinion, evidence of negligence that the plaintiff had been properly withdrawn from the car. It is his duty to direct judgment for the plaintiff. It does not appear to have commended itself to the Court, otherwise a new trial would not have been granted. But exactly what view was taken does not appear from the written reasons were given. It cannot have been a belief that upon a second trial some new facts would develop, for it is quite apparent that the plaintiff could reasonably have been called was called. And the essential facts are not really in dispute.

I am, with deference, unable to agree with the conclusion.

The effect of the first and second findings, as they must be, is that the defendants were negligent because the conductor failed in his duty to get the plaintiff when she should alight. But it is clear that no such duty was either alleged or proved.

It has long been regarded as a wholesome check upon ignorance and prejudice on the part of the jury so easily covered up in general terms, to the finding of facts. In this case the mere finding of negligence in answer to the first question is in itself a specific act found does not support the conclusion. Both must be read together, and, so reading, it seems to me that the proper conclusion at the trial was that plaintiff's action had wholly failed.

o I think a new trial should have been ordered. course, loath to interfere with an order based upon tion of the Divisional Court, and I would not do as not clear to me that to permit the order to stand an injustice to the defendants, and in effect no relief to the plaintiff in the final result. It is stesd that there are any new facts to be brought t a second trial. The facts are all before us, and quite clear upon the whole evidence that the plain- unfortunate accident was entirely owing to her own attempt to alight from a moving car. That is the it of the testimony of the witnesses called by the And it is not even clearly contradicted by the herself, who says: "Well, it stoppped as near as I " "As far as I could tell." "It was slowing up, ough it had stoppped." "It slowed up about like ould not have thought it was going." "It stoppped certain extent that I thought it had completely "It stoppped enough that I thought it had stop- o my best belief it had stoppped." "Well, I seen d slowed down pretty well, then I made the raise "

st this hesitating and perhaps not quite candid f the matter with the very distinct and positive s of Reginald Waters, who says: "I saw the lady e car before it stoppped, and when the car stoppped ear the tail end of it, and she kind of hollered and ar stoppped and the conductor got off." Q. "You positive that the lady got off before the car stop- "Yes." Q. "Which way did she get off?" A. ds." And of Thomas Funnell, who says he saw iff fall off a car. "When I first seen her she was up, and the next place I seen her was on the ne had got off the car." Q. "Was the car moving e?" A. "Yes." Q. "Was the car moving after er on the ground?" A. "Not very much, just a nd the other evidence called by the defence is to effect. In the face of such evidence no jury ough probably would find in favour of the plaintiff, or, d so find, their finding should be set aside as o the weight of evidence. That being the position, to me that it is not in the interests of justice to econd trial. The plaintiff has had her chance, and and that should be an end of the matter.

The appeal should be allowed and the costs, if claimed.

MEREDITH, J.A., gave reasons in his dissenting conclusion.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

No

C. A.

BANK OF NOVA SCOTIA v. I

*Promissory Note—Accommodation Note
Company to Secure Advances to Company
Personal Liability—Guaranty.*

Appeal by defendants from order of affirming the judgment of ANGLIN, J., at the trial, for the recovery of \$3,793.51 of plaintiffs for the recovery of \$3,793.51 on a promissory note for \$5,000, given by John Ferguson, the defendants, as security to the Standard Bolt and Screw Co., president and treasurer respectively. The court held that the note sued on was in substance an accommodation note for the ultimate amount due.

The appeal was heard by MOSS, C.J.O., MACLAREN, and MEREDITH, JJ.A.

J. Bicknell, K.C., for defendants.

C. A. Masten, for plaintiffs.

MEREDITH, J.A.:—The defendants gave the promissory note in question. Consideration was given by the plaintiffs to the defendants for it. The note was advances to be made by the plaintiffs to the defendants, which the defendants were chief officers of the company. The amount of which advances, to the extent of the note, was to be the amount of the liability of the defendants.

In these circumstances there can be no question as to the defendants' liability to pay such balance of the amount of the note. But it is said that the defendants did not give the note in consideration

00, which was agreed to be advanced at the time, was subsequently advanced, but has been repaid. It is very well be that the defendants as individuals are not bound by the document signed by them. It is of the company; yet it must be very cogent evidence against them, and it must be found as a fact that they as individuals assenting to all that was done by them as officers in respect of the promissory note; so that it is that they gave the note in question for the purpose indicated in the agreement, and that, upon the fact of that note so given for that very purpose, the question was advanced by the plaintiffs to the court, these defendants being all along its chief officers—now unpaid and overdue. How can the defendants escape liability? Prima facie they are liable upon the promissory note, for the amount of it; that prima facie liability may be reduced upon a defence shewing that the note was in respect of advances made on the faith of it

There is no encroachment upon the statutory provisions of the Statute of Frauds. The plaintiffs are not seeking to compel the defendants to answer for the debt, default, or breach of another; they are seeking to enforce the defendants' written promise to pay; it is the defendants who, by their conduct, seek to reduce their prima facie liability, set up the

J.A., gave reasons in writing for the same conclusion.

C.J.O., GARROW and MACLAREN, J.J.A., concurred.

NOVEMBER 2ND, 1907.

C.A.

RE NORFOLK VOTERS' LISTS.

Statutory Elections — Ontario Voters' Lists Act—Case decided by County Court Judge—"General Question"—and Cases—Refusal of Court to Answer Questions.

Decided by the Judge of the County Court of Norfolk
under s. 39 of the Ontario Voters' Lists Act.

Three questions arose:—

1. An unmarried man, a farmer's son, resides at his father's house. On 1st March he entered an agreement with a farmer living in an adjoining district to work for him during the farming season of the next months. During the currency of this agreement he resides and lodges with his employer, but leaves his property at his father's house, which he frequently visits. He intends to return on the completion of the term. He is so engaged in the adjoining electoral district on the last day upon which an appeal could be lodged upon the voters' list in the electoral district in which his father resides. The question is, was he a resident of and domiciled in such last district, within the meaning of sec. 8 of the Electoral Act.

2. An unmarried man resides with his father. He secures a position as teacher in a public school in an electoral district other than that in which his father resides. During the regular school term he resides on the boards in the district in which the school is situated. At other times he stays at his father's house. He leaves part of his clothing while engaged in teaching. He has been teaching for over a year. The question is, with his father, and his name appears upon the voters' list. Question: Has this teacher such a residence in the electoral district in which his father resides as entitles his name to be retained in the voters' list without his name being entered to strike it off?

3. An unmarried man resided with his father until he attained his majority. Since then he has supported himself by his own labour in various places outside the electoral district in which his father resides. He occasionally visits to his father's home for a visit. He wishes to file an appeal to the Court of Revision to remove himself at some place other than the electoral district in which his father resides. There is no other Court other than the above to shew where he has established a residence other than with his father. His name appears on the voters' list and an appeal is regularly lodged to the Court. Question: Should the appeal be allowed?

case was heard by MOSS, C.J.O., OSLER, GARROW,
N, and MEREDITH, JJ.A.

Cartwright, K.C., for the Attorney-General.

DITH, J.A.:—Section 39 of the Ontario Voters'
—7 Edw. VII. ch. 4 (O.)—provides that “in order
te uniformity of decision, without the delay and
appeals, (a) a Judge may state a case on a general
arising or likely to arise . . .” The Act does
y the character of such a general question, but
be meant is any general question which has arisen,
y to arise, in the performance of the Judge’s du-
the Act. However, one thing is expressly made
that is that the question must be a general, not
ar, one: the words “general question” are twice
he section, once in the provision for the Judge
case, and once in the provision for the Lieutenant-
in council doing so; and the purpose is to insure
y of decisions throughout the province, and the
f the Court upon the case stated is to be forth-
ished in the Ontario Gazette, and a copy of it is
t to every County Court Judge in the province.

of the questions stated in this case is one of the
mentioned in the enactment, none of them has any
tures of a general question, each is a specific case
upon its own particular facts, facts which may
precisely the same in any other case; so that an
ust be given upon each separately, and it can hardly
useful purpose to make it known that schoolmas-
or farm labourer Smith, is, or is not, a voter, upon
peculiar to his own case.

not competent for a County Court Judge to ask,
this Court to determine simple questions of fact
any particular case, nor within the competence
ourt to relieve him of his duty to find, in such
cases as these, whether, at the times necessary to
ight to vote, a particular person was in good faith
of and domiciled in some particular municipality,
ontinuously resided in the electoral district, as the
lection Act requires.

se cases may be properly made the subject of a
e, it is difficult to suggest any case, or question,
arise in the discharge of the Judge’s duty under

the Voters' Lists Act, which would not be in effect, might be given in any particular, although the Act provides that "the decision regard to the right of any person to vote shall be final."

In the case of *Re Voters' Lists of the Township of Ham*, 2 Ont. Elec. Cas. 69, this point was raised. Unfortunately such cases as this are generally contested in this Court, but are decided *ex parte*. And in this matter, though the case was stated upon its peculiar facts, it may have been thought that it really related to a class of cases—"Manitoba harvesters"—whose cases are speaking, practically alike.

For more than one reason I cannot follow the suggestion by Mr. Cartwright—these cases, must be ruled by the Sydenham County Court. Light is thrown upon the subject, by many learned County Court Judges ought not to be. Very great difficulty in coming to a point in those which he has stated, or indeed in the facts must differ in most if not all of them. *Drew*, 5 C. P. D. 59; *Ford v. Hart*, L. R. 10 C. P. D. 269; *Torish v. Clark*, [1897] 3 C. P. D. 312; *Beal v. Town Clerk of Exeter*, 20 C. P. D. 312; *Craignish, Craignish v. Hewitt*, [1892] 3 C. P. D. 312; *Attorney-General*, [1904] A. C. 287.

OSLER, J.A., gave reasons in writing in conclusion.

MOSS, C.J.O., GARROW and MACLARE

NOV.

C.A.

RE SOUTH FREDERICKSBURGH V. THE
*Parliamentary Elections—Ontario Voters
of Appellant—Residence—Forms in
Effect of.*

Case stated by the Judge of the County of
no. 10 and Addington under the Ontario V.

I. ch. 4, sec. 39. Question: Is a resident of and in a municipality in an electoral district who appeals the voters' list of another municipality in the same district, prepared by the municipal clerk under the Voters' Lists Act, but on which said last mentioned appellant is not entered nor entitled to be entered or, entitled to be an appellant against persons entered last mentioned list under the Ontario Voters' Lists

case was heard by MOSS, C.J.O., OSLER, GARROW, EN, and MEREDITH, J.J.A.

Cartwright, K.C., and E. Bayly, for the Attorney-

I. Mowat, K.C., for the voter interested.

ER, J.A.:— . . . Section 14 (1) of the Voters' Lists acts that the list, that is to say, the voters' list for the municipality posted up by the clerk of the municipality, subject to revision by the Judge at the instance of or who complains that the names of voters have been from the list or wrongly stated therein, or that the of persons who are not entitled to be voters have entered on the list; and sec. 15 (1) enacts that any whose name is entered on, or who is entitled to have be entered on, the list for the municipality, shall right for all purposes of the Act, upon giving notice (form 5) within 30 days after the clerk has posted list in his office, to apply, complain, or appeal to have name or the name of any other person corrected in, on, or removed from the list for the municipality.

on 17 prescribes the procedure to be followed by ter making the complaint," and refers also to form form of the notice to be given by him.

ing to form 5, voter's notice of complaint, the imacomplainant is there described as "I. S., a voter (or entitled to be entered on the voters' list) for the district of in which the said municipality situated." The question is whether this enlargesvisions of sec. 15 (1) so that the complainant may be who is a voter, &c., in any municipality in the electrdistrict, instead of, as the section in terms enacts, one

who is a voter in the particular municipality the voters' list of which he desires to have corrected.

Section 4 of the Act enacts that in carrying into effect the provisions of the Act, the forms set forth in the schedule or forms to the like effect may be used.

And sec. 7, sub-sec. 35, of the Interpretation Act, 7 Edw. VII. ch. 2, enacts that where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them.

In the former Voters' Lists Act, R. S. O. 1897 ch. 7, repealed by the Act of the present year, it was enacted (sec. 13 (1)) that the list should be subject to revision by the County Court Judge "at the instance of any voter or person entitled to be a voter in the municipality for which the list is made, or in the electoral district in which the municipality is situate;" and form 4 describes the complainant as "a voter or person entitled to be a voter in the said municipality (or for the electoral district in which the said municipality is situated.)"

In *Truax v. Dixon*, 17 O. R. 366, Armour, C.J., referring to many decisions on the subject of the effect to be given to forms or schedules given by an Act of Parliament, said (p. 374): "Whether forms given in the schedule to an Act of Parliament or in the Act itself 'are made to suit rather the generality of cases than all cases;' or 'are inserted merely as examples, and are only to be implicitly followed, so far as the circumstances of each case may admit;' or 'whether they may or may not be followed, and if followed, may be safely followed—must always be a question of the proper construction to be placed upon the Act of Parliament.'"

In the case before us it is manifest from the language of the enacting clause that the legislature has deliberately changed the law as it stood in the former Act, and has restricted the class of persons who may be appellants in respect of the voters' lists of a municipality to those who are, or are entitled to be, on that list. A slip has inadvertently occurred, such as Lord Campbell referred to in *Regina v. Epsom*, 4 E. & B. 1003, in fitting the form to the new section, and the old form in substance has been allowed to remain without making the necessary change, with the result that there is a contradiction between the enacting clause and

the form. In *In re Baines*, 1 Cr. & Ph. 31, Lord Cottenham said: "If the enactment and the form cannot be made to correspond, the latter must yield to the former." In *Dean v. Green*, 8 P. D. 79, Lord Penzance refused to allow the operation of the enacting clause to be restrained by the words of the form, and conversely in *Laird & Sons v. Clyde Navigation Trustees*, 8 Rettie 756, the Court refused to enlarge the words of the clause by applying the language of the schedule.

In *Regina v. Lake*, 7 P. R. 215, 230, it was held by Wilson, C.J., that the form of conviction given in a schedule, purporting to impose a penalty of three months' imprisonment, with hard labour, did not warrant the imposition of hard labour in addition to imprisonment, where the section of the Act providing for the punishment declared that the offender should be liable to imprisonment for three months, saying nothing about hard labour, though the Act which provided the forms declared that forms in the schedule should be sufficient for the cases thereby respectively provided for.

Here, the words of the form, so far as they describe the status of the appellant, are merely descriptive, and the form must be regarded as illustrative or exemplary only of what it should contain by way of information to the clerk and person appealed against, particularly as its use is, by the 4th section, permissive. It is intended that it shall shew, among other things, the status of the appellant, and for the express enactment or declaration defining who may be appellants, we must go to the section itself, rejecting the inconsistent description which is given in the form.

Our answer to the question submitted must, therefore, be that the person mentioned in the case is not entitled to be an appellant against persons entered on the voters' list for the township of South Fredericksburg.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

CARTWRIGHT, MASTER.

NOV

CHAMBERS.

BROOM v. TOWN OF TORONTO

*Parties — Joinder of Defendants — Joint
Pleading — Conversion — Negligence*

Motion by defendants the Corporation of Toronto Junction for an order requiring the plaintiff to pay costs against which of the 3 defendants he was entitled to be paid.

R. L. Gray, Toronto Junction, for the plaintiff.

Ross (McCarthy, Osler, & Co.), for the defendants.
Trunk R. W. Co.

C. Kappele, for the widow of Reuben Armstrong.

The plaintiff in person.

THE MASTER:—This action is brought by the plaintiff in person, alleging a joint conversion by the Corporation of Toronto Junction, the Grand Trunk Railway Company, and the estate of Reuben Armstrong, mayor of Toronto Junction.

As might be expected, it is not in the usual form.

The executrix of Armstrong has appeared, and in effect, that the action may be dismissed.

The facts as set out in the statement of claim are these. In October, 1902, the Corporation of Toronto Junction, in consideration of services rendered to him by the plaintiff, took certain goods from the plaintiff's store for safe-keeping in their municipal warehouse. The plaintiff called for: this taking over was done by the Corporation with the consent and approval of the council: they refused to do so. In August, 1905, when plaintiff was notified that the Corporation intended to take away his goods: before he could do so, the Corporation and council had them taken to the Grand Trunk Railway freight shed; they were then conveyed to the Grand Trunk Railway Company refused to deliver them to the plaintiff, and they are now in the possession of the Grand Trunk Railway Company in such a condition as to be of no value to the plaintiff, which in the 9th paragraph of the statement of claim is stated.

is said is "due solely to the gross negligence, omission and commissions of all three of the defendants in this

ever may be the result of the action (unless it is I think it is clear that the 9th paragraph sets up a good and intelligible cause of action against the defendants jointly, and that the plaintiff cannot be required

It might have been more regular to have made Mrs. Dunstrong, as executrix, a defendant, instead of the fact that is a matter of no great consequence, and it may be done. As is said in *Tate v. Natural Gas Co.*, 1882, why should the plaintiff not be allowed to try to determine whether he has a right to recover against these defendants jointly, if he can shew them to have been joint tortfeasors?

Probably the Grand Trunk Railway Company can secure relief under the provisions of Rule 215, and Mrs. Dunstrong may also have the same remedy, or it may ultimately be held that it is against the town corporation only that the plaintiff is entitled to proceed.

The present action brings before the Court all those matters from which the plaintiff can possibly proceed. And it is better for them that this should be done than that the plaintiff should bring a first, a second, and a third action. This, no doubt, is no ground for refusing a motion for summary judgment properly be allowed, but it is a consideration which often deters these motions from being made when the plaintiff is not thought to be financially strong. I think the motion should be dismissed without costs, and that the defendants should plead in a week.

RIGHT, MASTER.

NOVEMBER 4TH, 1907.

CHAMBERS.

BOISSEAU v. R. G. DUN & CO.

*Examination of Parties — Failure to Acquaint
Selves with Facts—Motion for Re-examination—Sub-
mission of Agent for Examination—Costs.*

Order by plaintiff for an order requiring two of the defendants to attend for re-examination for discovery in the circumstances stated in the judgment.

K. F. Mackenzie, for plaintiff.

T. P. Galt, for defendants.

THE MASTER:—On 4th October an oral examination for discovery of two of the defendants in New York, where they reside.

It was urged then that the defendants had no knowledge of the matters in question, but that under *Bolckow v. Fisher*, 10 Q. B. 91, they were bound to obtain all necessary information from their servants.

The examination was fixed for Saturday. The plaintiff and plaintiff's solicitor went with the defendants to New York, and, at the request of the defendants, the examination was proceeded with on Friday. The defendants, awaiting the arrival of their solicitor, who was away with all necessary documents, in company with the plaintiff, who is the agent acquainted with the facts of the case, who had previously gone to New York, and who instructed the defendants in the matter. The defendants, being examined, said they knew nothing and had they any documents.

The plaintiff is now moving for an order that the defendants attend again for examination, but is without evidence being given by Matthews. This was refused by the defendants, but refused by plaintiff.

The only question now is as to the disposal of the costs. As the examination was rendered abortive by the defendants, the costs of it should be to the plaintiff.

The order will further provide that Matthews be bound for discovery just as if he was a defendant. The defendants be bound by his evidence.

(Affirmed by CLUTE, J., 12th November 1891.)

CARTWRIGHT, MASTER.

NOTES.

CHAMBERS.

BASSETT v. CLARKE STANDARD

Mining Commissioner—Award of, under the Act to Enforce—Jurisdiction of Commissioner—No Necessity for Action—Dismissal of Action—Summary Judgment.

Motion by plaintiff for summary judgment. 603 in an action to recover \$365, the plaintiff

made by the Mining Commissioner on 30th May, 1907,
 119 of the Mines Act of 1906, as amended in 1907.

a Grant, for plaintiff.

Brown, for defendants.

MASTER:—It was contended that the whole policy
 of the Mines Act, as evidenced by sec. 9, was to give the
 Commissioner exclusive jurisdiction in all matters "which
 are or be brought before him under the provisions
 of the Act." For this purpose that section provides that
 the Commissioner shall have all the powers of a Judge of the High Court
 so far as to do complete justice between the parties;"
 and so "grant an injunction or mandamus in any mat-
 ter brought before him under this Act."

By sec. 119, sub-sec. (3), the Mining Commissioner
 in cases of the kind under consideration, "make such
 order for way of injunction, or otherwise, as he may deem
 fit for the enforcement of payment or security of the
 award."

By sec. 15 the Commissioner has power to award
 which "shall be recoverable as may be ordered by

the high status of the Mining Commissioner and the
 extent of his authority are evidenced by sec. 43, which dir-
 ectly appeals from his decisions go to the Divisional
 Court.

From all this it is plain that the Mining Commissioner
 has powers and authority far in excess of those which are
 given by a Judge of the High Court in Chambers.
 He has full and complete jurisdiction over the subject
 of the present action, and the jurisdiction of the
 Court seems to have been transferred to him.

It is in the affidavit of the defendants that it is
 alleged that the award is ultra vires. But, while I do not
 accept that suggestion, it would still be open to raise
 the question whether the Commissioner on any application made by
 the plaintiff to enforce the award.

The motion, in my opinion, must be dismissed, with
 costs in the cause, the point being now raised, as I under-
 stand, for the first time.

Moss, C.J.O.

No

C.A.—CHAMBERS.

KIRTON v. BRITISH AMERICA A

*Appeal to Court of Appeal—Leave to
Appeal from Order of Divisional Court
Questions—Special Reasons for Treas-
tional.*

Motion by defendants for leave to ap-
peal of a Divisional Court (ante 498) setting
aside the order of MABEE, J., dismissing the plaintiff's

H. D. Gamble, for defendants.

W. H. Blake, K.C., for plaintiff.

Moss, C.J.O.:—The action is upon
the balance against fire effected on farm build-
ings of the plaintiff. The amount sought is
\$550, that being the full amount of the
buildings, but it was proved or admitted
that it was \$1,225 or \$1,250.

The defendants maintain that they are
entitled to any sum in this action, which they allege
is being maintained by and for the benefit of the
company, one of whose engines caused the
fire of the insured buildings, the railway company has
entered into a kind of a settlement with the plaintiff;
the order was upheld by the trial Judge.

The case presents some unusual features
or two somewhat nice and rather important
in the course which it took before the Divisional
Court were not dealt with. The judgment of the
Divisional Court was set aside, and the plaintiff was awarded judgment
upon terms which may leave him in some measure
in recovery of the remainder of his claim.
I gather, he is not well satisfied. He is en-
titled to judgment for the full amount
without any of the conditions imposed by the

I have formed the opinion that there is
nothing for treating the case as exceptional and
granting an appeal. I also give the plaintiff liberty
to do as he pleases, the usual way, as he may be advised.

The costs will be as usual.

NOVEMBER 5TH, 1907.

DIVISIONAL COURT.

REX v. LOWERY.

Habeas Corpus — Order of Judge Discharging Defendant from Custody under Informal Conviction—Term that no action should be brought against Magistrate—No Power to Impair Jurisdiction of Divisional Court to Remove.

by defendant from order of FALCONBRIDGE, C.J., and the magistrates, when discharging defendant from custody on habeas corpus, providing that no action should be brought against the magistrate or other person in respect of the conviction or anything done thereunder.

Cameron, for defendant.

Cartwright, K.C., for the Crown.

Judgment of the Court (BOYD, C., MAGEE, J., and the magistrates), was delivered by

C.:—Lowery was discharged under habeas corpus on the ground that no offence was disclosed on the papers under which he was committed; and the Judge also ordered that he should bring no action against the magistrate or other person in respect of the conviction. Everything was of the informal character, and no conviction was drawn up, and the conviction was quashed. Upon the materials the defendant was charged with any criminal offence, but only with a criminal offence, and he was put in prison because he had committed a breach of law." He was entitled as of right to be discharged without any condition as to not bringing an action on the ground of illegal detention. There is no provision enabling the Judge who discharges ex debito justitiæ on habeas corpus to protect the magistrate from action. It is a direction depriving the prisoner of a civil right. So far as appears, he might have brought an action for his imprisonment without making any application for habeas corpus. The rule is laid down in a book of authority that the Court has no power to impose conditions when it discharges ex debito justitiæ: see Paley on Convictions, 10th ed. and Downey's case, 7 Q. B. 283, where the Chief Justice says that where the Court is bound to discharge it can impose no terms. The provisions as

to protecting magistrates found in the C the Ontario statute which were referred do not apply to habeas corpus, where ev stands when the prisoner is discharged.

As the case is shaped, the proceeding a civil and not of a criminal character direction complained of is one relating and I think we have jurisdiction to declare the order of discharge complained of is

CARTWRIGHT, MASTER.

CHAMBERS.

BROCK v. CRAWFORD

*Lis Pendens—Motion to Vacate—Cause
—Statement of Claim—Guaranty—P*

Motion by defendants to strike out statement of claim, and for other relief

W. N. Tilley, for defendants.

H. Cassels, K.C., for plaintiffs.

THE MASTER:—After the order made reported in 10 O. W. R. 587, where the statement of claim was amended claim to have the transfers to Sutcliffe

The defendants are not yet satisfied out those paragraphs of the statement of to the transfers of the assets to Sutcliffe any cause of action in respect of such require plaintiffs again to elect whether under the guaranty or under the trust the certificate of *lis pendens*. . . .

The chief object of the defendants' *lis pendens* removed. As to this I am bound to refuse, as a refusal to vacate is final: see 18 P. R. 447, on an appeal to Meredith.

Before that question arises, it is whether the other branch of the motion

The plaintiffs only set up one cause of action to be paid the \$10,000 secured by the deed. They submit that the trust deed of 1892 gives them a lien or charge on the assets

for a declaration to that effect, and to have the realized and their claim satisfied. If they are so enhanced it does not appear that the statement of claim is actionable, whatever may be the result after the case is heard. As was said in *Evans v. Jaffray*, 1 O. L. R. 307. "there is such unity in the matters complained of between all the parties as justifies the retention of (all) defendants." See, too, *Andrews v. Forsythe*, 7 O. L. R. 307. At present it must be assumed that the statements of the plaintiffs are sustainable. They may not be so—just as in *Evans v. Jaffray*, supra, the motion was dismissed as against the defendants other than Jaffray: see 3 O. W. R. 877.

The trust deed has been put in with the other material. It does not contain any express charge in respect of the property given to the plaintiffs by the defendants, but I cannot say that it may not have that effect. It assumes that the property is all the joint assets of the defendants; and it may be that under the whole facts it may be held to have that effect.

The defendants have paid into Court \$5,500. If at any time they wish to dispose of any of their properties, on payment into Court of a further sum of \$4,500 it would be possible to remove the *lis pendens*. At present it does not seem to be wise to order its removal. I cannot say that its registration is frivolous or vexatious. If the litigation is not proceeding rapidly, the plaintiffs are not to blame. The motion will therefore be dismissed with costs to the plaintiffs in the cause.

... C.J.

NOVEMBER 6TH, 1907.

TRIAL.

BURNS v. HEWITT.

Scale of—Trespass—Title to Land—Pleading—Division Court Jurisdiction—Rule 1132—Set-off.

... for trespass to land and for cutting down and carrying away timber therefrom.

... Henderson, Ottawa, for plaintiff.

... Hutcheson, K.C., for defendant.

... J.C.J.:—The action was tried with a jury at ... and resulted in a verdict for the plaintiff for \$35, ... only question for determination is that of costs,

it being contended on behalf of the plaintiff that no land was involved. Reference, however, shews that the only issue between the parties was of damages to which the plaintiff might be entitled by his statement of claim he claims to be entitled to from which the defendant cut and removed timber and he asks for damages to the extent of the value of the timber and \$50 for the trespass to the land.

The defendant admits the plaintiff's title to the land, and says that he was tenant of the plaintiff's land at the time of the cutting, and that no division fence marked the boundary between the plaintiff's land and that occupied by the defendant. He says that he was in ignorance of the location of the boundary and that he encroached on the land of the plaintiff and removed therefrom a small quantity of wood, and asks for damages of \$30, which he says is sufficient to satisfy the plaintiff by reason of the damage done. Thus the defendant expressly admits that the case was within the proper competence of the Court, and the costs should be dealt with according to Rule 1132, that is, the plaintiff should recover his Court costs only, and the defendant be liable for the costs of suit as between solicitor and client. The plaintiff's costs against the plaintiff's costs and verdict the plaintiff's taxable costs of defence above the plaintiff's costs incurred if the case had been in the plaintiff's favour and if such excess exceeds the amount of the plaintiff's taxed costs, the defendant to be liable for the balance against the plaintiff for such excess.

Nov.

DIVISIONAL COURT.

VIVIAN v. CLERGUE

Vendor and Purchaser—Contract for Sale of Land—Action to Recover Instalments—Land not Conveyed to Purchaser by Vendor—Terms of Agreement—Effect of Subsequent Agreement—Rectification—Action for Damages—Contract as Rescinded.

Appeal by defendant from judgment of the Divisional Court ante 186.

Middleton, for defendant.

Douglas, K.C., and A. H. F. Lefroy, for plaintiffs.

COURT (BOYD, C., MAGEE, J., MABEE, J.), dismissed the appeal with costs.

NOVEMBER 8TH, 1907.

DIVISIONAL COURT.

WOODS v. PLUMMER.

*—Privileged Occasion—Evidence of Malice—Con-
victed Statements—Evidence for Jury—Setting aside
—New Trial.*

by plaintiff to set aside the nonsuit entered by the judge, J., at the trial of an action for slander, and a new trial. The plaintiff was a car examiner, and the defendant's statement was to the effect that he had removed the seal off a car and taken out and concealed a number of handles.

The case was heard by BOYD, C., MAGEE, J., MABEE, J., and ROBERTSON, J. for plaintiff. The defendant, Stratford, for defendant.

J.:—The trial Judge rightly ruled that the statements complained of were made upon an occasion of qualification. He rightly held that it then lay upon the plaintiff to displace the protection afforded by the occasion of qualification of ill intent or malice, and that therein he failed, and so dismissed the action.

It is not enough for the plaintiff to prove that the statements were untrue; he must also show that they were untrue to the knowledge of the person who uttered them. Some evidence must be adduced which reflects upon the defendant's candour or honesty, and be submitted to the jury.

The plaintiff swore that the charge made by him to his superiors was not true in fact, and he also swore almost contemporaneously with the occasion when

the alleged defamation was uttered, the defendant told him that he did not know or recognize what that broke into the car. This conjunction of facts of a contradictory character, one to the plaintiff and one to railway officers, appears to be enough, without any ill intent or recklessness in making the statement. It depends on what view the jury will take of the plaintiff's version, that defendant told the railway officers that it was he who broke into the cars, and afterwards told the railway officers that it was the defendant who broke in, they may find that defendant stated to the railway people what he did not know or believe to be true—which is malice in law; or the jury may find from the plaintiff's interview with the defendant, that the defendant, in which case the plaintiff is entitled to recover.

Altogether, though this aspect of the case was presented to the trial Judge, I think that it should be withdrawn from the jury, and that the case should be tried. Costs will follow the result, unless otherwise disposed of by the Judge who presides.

MAGEE, J.:—I agree in the result, but I do not agree with the alleged statement of the defendant to the jury, the alleged slanderous statement being manifestly untrue as of his own knowledge, the matter should be left to the jury.

MAGEE, J., gave reasons in writing for his decision.

THE
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L, J.

NOVEMBER 4TH, 1907.

TRIAL.

IMPSON v. EQUITY FIRE INSURANCE CO.

IMPSON v. STANDARD MUTUAL FIRE INSURANCE CO.

Insurance—Actions on Policies—Defences—Statutory Condition 10 (f) — “Gasoline Kept or Stored in the Building Insured”—Small Quantity of Gasoline in Store Use—Defects in Proofs of Loss—Assignment by Surrender of Policy to Bank — Adding Bank at Trial as Plaintiff ab Initio and nunc pro tunc—Absence of Notice of Assignment—Subsequent Insurance not Assured to by Prior Insurers—Statutory Condition 8—Substituted Insurance—Prior Insurance Undisclosed—Insurance Effected by Mortgagees without Knowledge of Insured—Fraud—Incumbrances Undisclosed—Immateriality—Costs—Technical Defences.

cases upon policies of fire insurance.

W. Gamble and F. L. Smiley, New Liskeard, for plain-

ts. Raney and R. W. Eyre, for the defendants.

W. Hellmuth, K.C., for the Union Bank, added as defendants in each case.

WELL, J.:—These cases arose out of what, if one disregards the current euphemisms, would be characterized as an attempt on the part of two fire insurance companies, which I presume consider themselves respectable,

to defraud the plaintiff by refusing to pay for his loss covered by their policies, and of the most flimsy character. The only defence that is to be commended is the honesty and skill with which the defences were conducted by Mr. Raney and Mr. Eyre.

The plaintiff had a furniture and drapery store, in Northern Ontario, and took out a policy in the Equity Fire Insurance Company, No. 1906, for one year from 25th May, 1906. The building No. 214 Sharpe street, and the application of the plaintiff.

He also had insured in the Standard Fire Insurance Company, this being evidenced by a policy No. 19793, dated 27th August, 1906. The policy was for \$1,500, and was upon the stock of fixtures, fittings, etc., \$500, for 12 months from 1st September 1906. The application for this insurance was made on that day.

Not being a qualified chemist and druggist, the plaintiff had in his employ, in one branch of his business, a member of that profession, Post by name, who was also tenant of the plaintiff, and occupied the store. He had a gasoline stove, which he used a few times, and then discarded, leaving in the store a quantity of gasoline.

On 4th September the druggist, desiring to use the "fruit essences," so called, I understand, for fruit in them, for the soda fountain, and in the longer process, brought down the stove and lighted it, leaving it in the back of the store. At the same time smoke and fire were noticed. The fire started from the stove.

Every effort was made to extinguish the fire, but apparently to a break-down in the fire apparatus, the attempt was unsuccessful. At the time the fire was put to the plaintiff by counsel for the Equity Insurance Company looking toward a contest, or might have been some want of activity on the part of the plaintiff in having the fire put out, but there was no foundation for any suspicion of or charge against the plaintiff of that or any other impropriety. The Equity Fire Insurance Company go further and

the fire was caused by the act of the plaintiff himself. Pleading, in my view, is a disgrace to the party pleading unless there is something justifying such a plea. This remained upon the record, and still remains, but no evidence was offered in support of it, and I have already said there is nothing upon the evidence to justify it. Were I called to dismiss the action against the Standard Fire Insurance Company, I should order them to pay the loss. The loss of the plaintiff was largely in excess of the insurance.

Shortly after the fire, one Graydon, an adjuster for the Standard, and under special instructions from the Equity Insurance Company, came to New Liskeard. The plaintiff was very anxious to get his money; the adjuster represented that the Standard's policies were voided by reason of the fire having taken place in a building containing gasoline, and it was arranged that the plaintiff would accept an immediate settlement take from the Equity \$1,500 or so, and from the Standard \$1,000 in full. The adjuster prepared the proofs of loss, or had them prepared, as a matter of course, and had the plaintiff sign them. These proofs of loss were given and received "without prejudice" and simply as a matter of form. If I were to be at liberty to recall my experience, I would say that having had while at New Liskeard a great deal to do with insurance companies, I know it was a very common practice, when an arrangement was made with an assured by way of settlement or compromise, still to insist upon proofs of loss being put in to be put away in the files of the company. Whether this was the object of the adjuster in this case or whether he was desiring to make evidence for his own use, I need not determine. The fact is that it is never understood that these proofs of loss should be such as to be required in a disputed claim, and that they were given by the plaintiff without prejudice to any claim he might assert if the arrangement he thought he was making was not carried out. In this, as in all other matters, I do not place the plaintiff of all charge or imputation of wrongdoing. I believe he was a perfectly candid and credible witness, and where his evidence differs from that of any other witness, whatsoever, I unhesitatingly accept his account as the true one.

The proposed arrangement was not carried out—the Standard refused to pay.

The plaintiff's bankers, the Union Bank, obliging him for security, he, on the 15th November, assigned to that bank all his "right, title, and interest in any money which is or may become payable to him, and by virtue of the following policies of insurance" (setting out these insurance policies and insurances) authorized "the said bank to give a good discharge to the insurance companies." No notice of this assignment was ever given to the insurance companies, and the insurance companies had no knowledge of it until the commencement of the action—indeed, counsel for the Mutual Fire Insurance Company said that they knew nothing of it till the fact came out at the trial.

The J. J. McLaughlin Company (Limited) was the plaintiff with a fountain, upon which the bank had thought they had a lien—I find as a fact that the bank also had an account against the plaintiff for a considerable amount, and desired a settlement. The plaintiff went to the office of the solicitor for the J. J. McLaughlin Company, and informed the solicitor that he had made an assignment to the Union Bank. He, the solicitor, assigned, and did assign, to the company the Standard, but expressly on the condition that the Bank would relinquish their claim. This the Bank would not do, and will not do. This assignment was made about 20th November, 1906, and the plaintiff. The solicitor swore that without the knowledge of the Mutual Fire Insurance Company that they should pay \$500 in full; and then, the solicitor says that he credited the full amount of \$1,000 to the plaintiff, and he says that this arrangement was expressed to the Mutual Fire Insurance Company to be without admission of liability, and for the sake of convenience, as arrangements always are. This arrangement was made irrespective of the result of this action. The plaintiff knows that the plaintiff will benefit by his assignment to the Standard Company, no matter what may happen here. The question of the McLaughlin Company is in reality only to the Standard case, but I will not mention it here.

The plaintiff, being unable to get his money, brought these actions, and they came on for trial at North Bay Assizes. I struck out the jury

cases together. Some of the witnesses not being present, I adjourned the hearing to Toronto, and I heard the remainder of the evidence and the argument here. Counsel have been good enough also to put in a written argument upon certain points—I may say that I have derived assistance from the very careful and able arguments of the counsel concerned.

Standard insurance being evidenced by an interim policy and the Equity policy not having any variations material to the case, it is clear that both insurances are subject to the statutory conditions, and to these alone. Both policies rely upon condition 10 (f), which provides that the company is not liable for the losses following, that is to say:—

For loss or damage occurring while . . . gasoline . . . is . . . kept or stored in the building insured containing the property insured, unless permission is given in writing by the company."

Permission was in either case given by the company, and it is manifest that the companies will escape liability, and what was done in this case makes it right to say that "gasoline as kept or stored in the building."

The plaintiff knew nothing of the use of gasoline before the fire. Graydon is in error in saying that the plaintiff knew that before the fire he knew of its use. This the plaintiff may not, indeed cannot, assist the plaintiff, nor can the express order to Post not to have gasoline upon the premises. Insurance companies are entitled to the full protection given them by the statutes, but they are entitled to no more.

It would shock any ordinary person to be told that he allowed a small quantity of gasoline to remain under a guarded stove, he thereby "kept or stored it." I have, for example, a box of cigars in my smoking room—I hope I do not "keep or store" tobacco on my premises.

These collocations of words have been often interpreted by the House and other Courts. For example, in *Biggs v. Mitchell*, 12 B. & S. 523, the prohibition in the statute of 12 Geo. 4, whereby it was directed that no person shall "have in his possession more than 200 lbs. of gunpowder," was considered, and it was held that the two words must mean the same. And in *Foster v. Diphwys, &c., Co.*, 18 Q. B. D. 428, it was said of the words "case or canister." On the other hand, "keep or store" should not be held to mean any-

thing more than "store," and I should not think that the present was an instance to which it could rightly be applied. But authority is in the very phrase. In *Mitchell v. London*, O. R. 706, it was held in the Queen's Bench, a divided Court that crude and earth oils for such purposes could not be said to be "stored." That the above clause (f) did not apply: that was held by the Court of Appeal, 12 A. R. 262. *Hague v. Lord*, 268: "It is not 'stored or kept,' in the sense of the words, which seem to point to a dealing as the dealing in such articles, or having them for." The definition implied in these words is that the goods are stored for sale.

Many cases were cited to me decided in England, less like those in our statute, and I think the authority in other Courts is in favour of the interpretation upon the statute which would hold that the clause did not shew a violation of clause 10 (f).

For example, in *Williams v. Firemen's Co.*, 54 N. Y. 569, it was held on appeal during the last Term that a provision forbidding the storing of certain hazardous articles, amongst them petroleum, should be interpreted so as not to prohibit the use of a jug of petroleum for use as a medicine. *Williams v. Firemen's Co.*, p. 572: "The provision against storing is obviously aimed at storing or keeping in considerable quantities, with a view to sale." Many cases are cited in the arguments and may be referred to in support of the construction on this side.

I do not think it would answer any purpose to go through the many cases cited, some of which are words quite different from those in our statute. It is sufficient to refer to *Joyce on Insurance*, and to *May on Insurance*, 4th ed., sec. 2, and also to the cases mentioned in *Clement's Insurance Law*. The former work says: "Another of the purposes of an insurance policy is that prohibiting the storing of certain hazardous articles: this provision has been interpreted as covering only those cases where the storing of the prohibited articles is the sole object, and not to the storing in a mercantile sense: for safe custody."

says: "Storing has been defined to mean keeping custody to be delivered out again in the same substantially, as when received, and to apply only to storing or safekeeping is for trading purposes, the sole or principal object of the deposit, and not is merely incidental . . . as when kerosene is the purpose of illumination or saltpetre for the curing meats"

It may well be that the definition indicated in the dicta learned text writers will be found to be too narrow—seems to me clear that the remarks of Hagarty, C.J.O., enote a definition as broad as the words reasonably ere must be something in the nature of dealing in cles or having a storehouse therefor. I am of opinion no Court could give to the words a meaning wide o cover the present case. defence then fails.

said that there were defects or worse in the proofs I think that if there are any such defects, they are ers which are of any importance and did not arise y fraud or other impropriety: and I "consider it le that the insurance should be deemed void or by reason of imperfect compliance with such con-

I therefore, under sec. 172 (1) of the Insurance S. O. 1897 ch. 203, hold that the liability of the e companies is not discharged thereby.

he trial it became known to the defendants, or at he Equity Fire Insurance Company, that the plaintiff e an assignment to the Union Bank. I thought that n Bank should be made a party plaintiff, and that e under objection by the defendants. It is clear d the power to add the Union Bank under the cir- es: *Hughes v. Pump House H. Co.*, [1902] 2 K. n the Court of Appeal; it not being a case of setting w claim.

contended, however, that, as regards the Union e statute bars any claim, clause 22 providing that ction . . . against the company for the recovery claim . . . shall be absolutely barred unless ed within the term of one year next after the loss e occurs." It is argued that the Union Bank can ered as suing only as from the time at which they d as parties, and that is more than a year from erence of the loss or damage. *Holmsted & Lang-*

ton, p. 528, is cited for this last proposition. I find myself able to agree with the learned judge in the result of the cases cited by them at all supports to the proposition. [Ayscough v. Buller, 41 Ch. D. 341, and 29 Ch. D. 584, distinguished.]

The provisions of the Rules seem to be the reverse. Rule 206 makes a sharp distinction between a plaintiff and defendant added. The Court is to add a party at such stage, and upon such terms as are just, as a party. In the case of a plaintiff, "he may be added or substituted as a plaintiff by his own consent in writing thereto to be filed with the petition or answer. A provision is made for an added defendant. In the case of defendants they are to be served, &c., "and the writ shall be deemed to have been served on them from the time of service." No such provision is made for a plaintiff. It seems to me that the Court has power to add or substitute plaintiffs (they having no objection) and that such addition or substitution is valid in the absence of provision to the contrary. The Court may, indeed, impose terms on the writ. Terms may, indeed, be imposed on the writ. 41 Ch. D., and one of these may be that the plaintiff is entitled only to the relief they could have obtained if they had commenced at the time of their joining. —perhaps most—that would be a reasonable condition— but not, I think, in a case like this. The Court may, indeed, refuse to add the plaintiff if the addition of the plaintiff is technically improper. The Court may, indeed, refuse to add the Union Bank as parties ab initio. By reason of an arrangement made between the Equity company and the Union Bank, the Equity company agree that the Union Bank be thus added, and it is only in reference to the Standard that the question is material.

But I do not think that, even with the writ set aside, the defence can succeed.

The Union Bank not having given notice of assignment, as required by the statute, Ontario Act 1890, sec. 58 (5), at law the action must have been brought by the present plaintiff. I do not find any authority or decisions which takes away the common law right of a plaintiff to sue. Even had the document been an equitable assignment, it would have been valid against the bank, if they sued, to add the plaintiff as a party. And if the bank had brought the action, it would have been trustees for the plaintiff for part

n, as the amount of the claim to secure which the amount was given is considerably less than the amount policies assigned. That the plaintiff has an interest in the subject matter of the action is most manifest—and the bank not asserting any claim adverse to the plaintiff, by allowing him to bring and proceed with the case as sole plaintiff, I do not think that the defendants have taken the advantage of the assignment. It was, of course, that the bank should be made a party, that the rights of the interested might be protected.

minor defences are to be now considered. The defence of the Equity Fire Insurance Company as to subsequent insurance is based upon the following facts. On 3rd August the plaintiff made an application to the Equity company for a further insurance of \$1,000 upon the building, and received an interim receipt, No. 10166. A policy was actually sent, but the interim receipt was not returned, and, therefore, the company held the plaintiff in default for the further sum of \$1,000 during the currency of the interim receipt, i.e., at least 30 days from 3rd August, and September. Some correspondence is put in between the company and their agent, shewing a willingness on the part of the company to take the risk at a premium of 10 per cent. I do not think the reason is material: at all events, on 3rd September the plaintiff, instead of taking the Equity company's policy, took out insurance in the Atlas Fire Insurance Company for the same amount, in substitution for the insurance under receipt No. 10166, and through the same agent. It is admitted that the Atlas is a company of the highest standing, and no exception can be taken to it. The agent at New Liskeard, being the agent for both the Atlas and Equity companies, sent into the head office at once a letter (not dated, but received on 5th September), and the interim receipt, with a statement that it was not wanted. The fire took place, as said, on 4th September, 1905. If the plaintiff had, immediately after receiving his interim receipt from the Equity company, said word to the Equity, it is possible that that company might have received the letter before the fire actually broke out—but no time could be lost.

The Equity company now say that this is subsequent insurance to which they did not assent, and therefore the Atlas is void by the 8th statutory condition, which provides that a company is not liable for loss . . . if any

subsequent insurance is effected by any less and until the company assents that the company does not dissent in writing without receiving written notice of the intention of effecting the subsequent insurance, or does not dissent after that time and before the subsequent insurance is effected." On 4th September 1905, their New Liskeard agent that they were issued their interim certificate 10166 at 3 per cent. I remembered that they had themselves received under that receipt for 30 days. I think this is entirely covered by the decision of the court in *Mutchmor v. Waterloo Mutual Fire Insurance Co.*, 606, 1 O. W. R. 667. And I cannot see any difference that in the *Mutchmor* case the subsequent insurance was effected in another company than the one in the present case the former insurance was effected by the company itself. I think this defence fails.

As regards the defence of prior insurance, this seems to have been under a mistake as to the company. When Graydon went out to see the plaintiff, he (Graydon) told him that the mortgagees had an insurance upon the property in the Norwich Union Fire Insurance Co. to cover their claim under a mortgage. As to the pro forma proofs of loss, the other insurance property was mentioned as \$1,400. This was the amount the plaintiff knew of any insurance put on by himself, but he accepted the statement of the mortgagees, the proofs of loss put in afterwards, and the insurance at the sum put on by himself.

It was thought at the trial that there was no insurance in the Norwich Union, and I gather that the Equity company should abandon the Union Bank being added as a party to the facts as to this prior insurance should be proved by or by joint statement of counsel. Such a statement was put in. From it, it appears that there was no insurance in the Norwich Union, but an insurance in the Union Assurance Society on the 19th of September 1905, in the name of A. & A., New Liskeard mortgagees—that the society was the mortgagees of the fire on 5th September 1905.

h September. I do not think that is put on by mortgagees for their which the owner was entirely ignorant, and indeed this is admitted by v. Phoenix Insurance Co., 19 U. C. shews fraud on the part of the plaintiff, 4th ed., sec. 365, and cases cited. but the other insurance at \$1,400 and far as actual fraud or intention to do concerned, I find the plaintiff quite innocent the kind; and I am unable to give any opinion of the company.

w only to notice the defence of incurred. The fact is that the plaintiff, upon ed. The fact is that the plaintiff, upon erty, had paid his solicitors the full purchase, supposed that he owned the property free rances. The solicitors, however, found that a small amount (about \$300) refused to take discharge his mortgage, so they, months after as effected, repaid to their client the amount. misrepresentation as to title was made. The e company admits that the disclosure of the subsisting was not material, and would have erence. I do not think that this brings the he first statutory condition. At the trial court Equity abandoned all right to relief on this I notice it now only because the point is raised eadings.

andard Mutual Fire Insurance Company set up e peculiar to their case, that the assignment to e McLaughlin Co. Ltd. divested the plaintiff of f action, and that the proofs of loss are insufficient already dealt with the first, and my remarks proofs of loss apply equally to this company as to y.

ferences wholly fail, and there must be judgment for tiff for the full amount of the policies, with interest a day 60 days after the receipt of the proofs of loss. ndants will also pay the costs—these costs are not d the amount which would have been incurred had on Bank been made parties from the beginning, but lude the costs of the trial both at North Bay and , the argument, and as against the Equity company

a reasonable sum for procuring the facts in the Union Assurance Society.

I cannot part with these cases without the course taken by these companies as I have said, I had very considerable cases: and I think I may say that it was the opinion of all respectable companies not to pay defences such as have been raised in these cases in which there was well grounded suspicion on the part of the insured. Judged even by the standard of expediency, it was found for insurance companies that "honesty is the best policy" and it is rather against one's ideas of honesty that a claim such as this, having no suspicion and nothing to indicate aught but fairness, should be contested upon the grounds taken here. It is not to prevent an insurance company taking the law or practice entitles them to do so, but it might be well for insurance companies to consider whether such defences as these are responsible for the feeling that notorious in the country against them.

CARTWRIGHT, MASTER.

Nov

CHAMBERS.

TODD v. LABROSSE.

*Summary Judgment—Rule 603—Action
—Nominal Plaintiff—Defence—Ren-
demnity—Action in Foreign Court—
—Addition of Parties.*

Motion by plaintiff for summary judgment under Rule 603 against defendant Labrosse; and motion for Labrosse to add parties and stay proceedings until brought in Quebec.

A. B. Morine, for plaintiff.

J. M. Ferguson, for defendant Labrosse.

MASTER:—This action is against the two last only of a promissory note which is held by a nominal plaintiff, to whom it was admittedly assigned for the purpose of suit after maturity; and who therefore holds it to all its equities. . . .

The plaintiff has made the usual affidavit. On this he was cross-examined, and shews, as was to be expected, that there is nothing about the facts except what he has been sworn to. He states that he is lending his name to the Imperial

Bank as argued by Mr. Ferguson that this was not a compliance with Rule 603. He does not even know if the note has been renewed, and never asked about this, nor can he say why the other parties to the note are not being sued, and his motion is made only against Mr. Labrosse.

On the other hand, Labrosse has filed a lengthy affidavit, in which he has not been cross-examined, and which must be accepted as true. In it he sets out the facts of the transaction as a history of the whole transaction out of which the dispute arose. In the 14th and 15th paragraphs of that affidavit he alleges that this note has been renewed by Fortier, Mann, and this is corroborated by an affidavit of Fortier, who is acting for these defendants in an action brought against them in Quebec by Mann and Fortier. Labrosse also states that the note has been paid by Mann and Fortier, and that this action is really brought at their instance to assist them in the Quebec action, which is for a balance due on that Labrosse and his co-defendant are bound to satisfy them against this note.

The defendant has moved under these circumstances to have the Imperial Bank and Fortier and Mann added as parties. But this does not seem necessary for the determination of the question between plaintiff and the present defendants, and, therefore, they should not be added without the will of the plaintiff. See *Reid v. Goold*, 13 O. R. 8 O. W. R. 642, and cases there cited.

The motion is, therefore, dismissed with costs to the plaintiff in the cause.

In bringing into consideration the facts as developed in the affidavits filed on these motions, I think that there are no undisclosed such facts as should be deemed sufficient to require the defendant to have the action tried out in any other way after full disclosure both of documents and of facts, including the assignor of the nominal plaintiff,

if so desired. That in a case of this kind the order should not be granted seems to follow as a matter of course in cases such as *Imperial Bank v. Long*, 121, 161. As I have lately pointed out, the defendant, after having my order for judgment, did not even appear at the trial.

The Courts of this province have refused to grant proceedings in Quebec, and the motion for judgment should not be granted. But, though it might be granted, it is not to be made such an order, if the power to do so is not clearly and justly seen only right and just that the order should proceed in the regular way.

The plaintiff, it is conceded, took the case to all its equities; what these are on an interlocutory motion with conflict of evidence.

The motion for judgment, in my opinion, is dismissed. The costs will be in the cause of the plaintiff.

CARTWRIGHT, MASTER.

NOVEMBER

CHAMBERS.

ARNOLDI v. COCKBURN

*Particulars—Statement of Claim—Complaint—
Order—Pleading—Evidence*

After the decision reported ante 64, the case was submitted to examination on the defendant's motion, and better particulars, and that motion was granted on 7th November, 1907.

F. E. Hodgins, K.C., for defendant.
R. McKay, for plaintiff.

THE MASTER:—The point for decision is this: has the order of 16th May been substantially complied with?

That order was made because (see 94) the plaintiff's "is such a substantial claim that the defendant should know how it has been arrived at before the trial." fence."

plaintiff has furnished particulars covering 13 type-pages, and giving details as to 73 different days.

objected that these are not sufficiently definite, and respects are not confined to the matters set out statement of claim.

is examination as a witness on this motion, the gave the sources of information from which the rs were made out. He says he has a mass of mater- which these particulars may be supplemented when o be prepared for trial, and this material is gone over purpose. At that stage, by the usual discovery, ut may obtain further information if it is thought y to do so.

amount claimed is, no doubt, large, but the issue ed between the parties is very simple: What is plain- tled to be paid for services which were admittedly ?

et no statement of defence has been delivered. De- may now make such an offer by his pleading and e into Court as will terminate the action.

ever that may be, I think that the plaintiff has ufficient details at this stage to enable defendant ow how the sum of \$7,500 was arrived at" (see p. ra), to enable him to form a judgment of the rea- ss of the demand.

defendant should plead within a week—and the this motion should be in the cause.

se 70 of the particulars was expressly objected to. it was intended to give defendant notice that the of the plaintiff at the trial would necessarily be or al character, and that the names of the 25 gentle- given so as to indicate the nature of the services h, rightly or wrongly, the plaintiff is making his the action.

plaintiff did not seem anxious to retain it, if defend- ks he is in any way prejudiced by it. This appears to the part other than the 25 names mentioned.

BRITTON, J.

No

TRIAL.

PAYNE v. TEW.

*Fraudulent Conveyance—Interest in Land
for Purchase—Assignment by Purchaser
Action to Declare Daughter Trustee
—Honest Transaction.*

Action upon a money demand for \$1,302 by
defendant James R. Tew, and, on behalf of
defendant James R. Tew, to have defendant
declared a trustee for her father, James R. Tew,
and land in the township of Raleigh.

Ward Stanworth, Chatham, and W. E. Gundy,
for plaintiff.

W. E. Gundy, Chatham, for defendant.

No one appeared for defendant James R. Tew.

BRITTON, J.:—On 22nd October, 1895, James R. Tew entered into an agreement with the Chatham Building and Loan Association, Toronto, for the purchase of property mentioned for \$1,302, payable by successive monthly instalments of \$7 each, the first due and payable on 1st December, 1895. This was a very onerous one for the purchaser, as he had to pay for payment of insurance and taxes, to pay interest after default of any instalment, and to pay per annum, compounded monthly upon default. If the payments fell into arrears, all payments were to be treated as payments at the rate of \$7 a month, etc., etc., etc.

The defendant James R. Tew was a poor man—a man of small means; he was formerly employed at a monthly wage, and for some time prior to June, 1906, he sold meat by retail, supplied from plaintiff, who was a butcher, and sold by the carcase or side.

On 4th July, 1906, James R. Tew was paid a large sum of money—the plaintiff's money.

defendant says not nearly so much. Plaintiff alleges that prior to that date James R. Tew and his daughter M. Tew entered into a fraudulent scheme or conspiracy for putting this agreement for the purchase of property into the hands of James R. Tew and into the hands of his daughter Lillian, for the purpose of defeating, delaying, and defrauding the creditors of James R. Tew, and in furtherance of that scheme, James R. Tew assigned the property to Lillian, and she procured a conveyance of the property mentioned from the Dominion Permanent Loan Co. and the Messrs. of the Dominion Building and Loan Association, and herself. The plaintiff asks that this assignment be declared fraudulent; that Lillian be declared a trustee; and that a sale of this land be ordered for the benefit of the creditors.

The evidence establishes that James R. Tew was not a provider for his family. He seldom furnished money for household or family expenses, and was not a success in business.

On the other hand, his wife and children were apparently workers. Mrs. Tew taught music, and the children were wage-earners as soon as able to work.

On the 22nd October, 1896, James R. Tew rented the property in question, paying \$5 a month as rental, but upon the property being offered to him for what was called \$700, on the monthly instalment plan of \$7 a month, he wanted the place purchased, and so the father entered into the agreement mentioned. The first monthly instalment became due on 1st December, 1896. By a pass-book produced (exhibit 14) there is shewn a credit on 8th December, 1897, of \$31 applied in full for December, 1896, January, February, and March, 1897, instalments, and \$3 applied on the April instalment. This sum was really applied for painting, which by the agreement the vendors were to pay for, and which James R. Tew did or waived. The instalments were paid, not always promptly, but paid. On 1st December, 1897, the December instalment having been paid on 20th January, 1898. Then the instalments for January, February, and March, 1898, were not paid and he defaulted. The story of the defendant Lillian is that in April, 1898, her father talked of abandoning the property at purchase and of falling back upon the renting, presumably treating the agreement as cancelled, and

paying only \$5 a month as rent, and purchase. The family urged against father told Lillian that if she liked the matter and keep up the monthly instalments of the property. She agreed to this, and a few years, she was assisted by her mother, who was ill and not able to work steadily, but in April, 1906, she furnished the money, gave it to her mother, who in turn paid it to the Dominion company. She says she saved up out of her wages, and at the end of the year her mother for the payment of these instalments were paid, as appears by the receipts by the mother with any such promptness. Lillian says they were paid to the mother, and to Lillian and the acceptance by her, corroborated by the evidence of her mother and by the evidence of her brother. It is also shown by these 3, mother, son, and daughter, having sworn in swearing to this offer to and acceptance, and if they have not, if the verbal arrangement was made and if from that time payments were made in pursuance thereof, then it completely negates any conspiracy to defeat or delay creditors.

No doubt, it is a very singular thing that Lillian, 16, as was Lillian in 1898, would make such a kind, but there is less difficulty in accepting the offer given than in coming to a contrary conclusion from the evidence.

The 3 witnesses, mother, daughter, and son, are to be truthful; they were not shaken on cross-examination; there was not in their appearance in the witness box anything to indicate a want of veracity.

In 1906, and in June or before, Lillian had thought of marrying and going to Britain. She wanted this house agreement closed, and she wanted to borrow money and pay the Dominion company. Mr. White, of Chatham, acted for her. He was as solicitor for her father, and was a man of high standing as a creditor of her father to a small amount. He went to the Dominion company for a statement, and a present payment of \$413 would be made. He asked for a deed for Lillian, upon

plied that there had been no agreement with her, no record of her interest, if any, and they required consent from her father to her. This assignment was made and executed, dated 5th June, 1906. It does not state the amount due, as it was not \$450; but the \$450 was raised by Lillian upon mortgage to a bank; the difference between \$413 and \$450 being made up by the conveyancer, Mr. White, in payment of incidental costs, and of some claim of his against the estate of James R. Tew. The mortgage is dated 28th May, 1906, the conveyance impeached is dated 4th June, 1906, the consideration stated is the original price of the property, \$1,302. The assignment of 5th June, 1906, from James R. Tew to the defendant Lillian, does not recite any agreement as Lillian and her brother and mother set out. It does recite that Lillian had been making payment under the agreement of 22nd October, 1896, and in reliance on that and of the further payment to the bank of \$450, the assignment is made. As a matter of fact, the payment of the \$450 was not made to the assignor, but was paid to the Dominion company, the balance being for expenses, insurance, and possibly a small debt to James R. Tew, provided for at the instance of the conveyancer, Mr. White. Very likely he was looking out for himself as for the defendant.

James R. Tew was called by plaintiff, and being ill, his evidence was taken as fully as it otherwise would have been. He was asked questions for defendant Lillian, and did not know of the estate of James R. Tew, if he was insolvent, and he knew of any fraudulent intent on the part of any party to the transaction.

Mr. Macdonald, counsel for the plaintiff, in his able argument, cited a great number of cases, all of which I have examined. Many of these were cases where the conveyances were impeached by the grantor on the ground of fraud, or want of capacity, or where made without independent advice. These do not assist me. This is a question of fraudulent intent on the part of James R. Tew, the assignor of the agreement, and of his daughter Lillian, on the part of either. I have fully considered the evidence upon this point. I think the plaintiff has not succeeded in establishing the fraud.

Then I am of opinion that the assignment is considered an assignment for value. That I have said, concluding, as I do, that the money came from her own earnings, through her motherly payments to the company, and, in addition, borrowed from Mrs. Scott \$450 on mortgages, of which the \$413 was paid over to the company, she became liable on her covenant in the mortgage. Admitting that the father was entitled to the property until she was 21, that happened since then, if her story is true, she has paid the mortgage, so happens that the mortgage to Scott is dated 1906. The assignment of the agreement and deed from the company 6th June. That is the inference that Lillian thought she was released from the company upon payment of the mortgage without any formal assignment of the agreement to the father. Her solicitor had ascertained the value of the property and had prepared the mortgage, before the company gave for an assignment of the agreement. That is the corroboration to Lillian's evidence as to the value of this property. She got no rent from the company, nothing for board. It is a family matter, and evidence is available except that of the father, and the place of residence is not known.

The plaintiff complains that having no knowledge of the assignment, or of the daughter's misdeeds, he was misled and induced to give the father credit, thinking that the father was the owner. The assignment was never registered. There was nothing to show that Tew had any claim. He had formerly been known to the public, apart from what might be told, and he changed. The plaintiff probably asked no questions, and gave credit to an extent he ought not to have done, likely he was misled by statements of the father.

There is this further to be said about the assignment of which is attacked. On 6th June, the date of the assignment, the monthly interest on the 1st May and 1st June, 1906, had not been paid. On the terms of the agreement it was in the power of the company to say that the agreement on their part was forfeited, and that all the money paid should be applied on rent. The company were not bound

of either defendant as purchaser; that they did recognize the claim of the defendant Lillian M. Tew was an act of indulgence to her. If this agreement had stood, upon the rescinding of James R. Tew, without any assignment having been made, the company would not be obliged to recognize the claim of any creditors.

None appeared for any creditor to make any monthly payment. If the company had objected to recognize the rights of creditors, and had stood upon their legal rights, this property could not, in my opinion, after these facts and under the agreement, have been reached under execution against James R. Tew.

The action against the defendant Lillian M. Tew should be dismissed with costs.

NOVEMBER 11TH, 1907.

DIVISIONAL COURT.

ALEXANDRA OIL AND DEVELOPMENT CO. v. COOK.

and Misrepresentation—Sale of Oil Leases to Syndicate—False Representations as to Value—Formation of Company—Assignment of Leases to—Secret Profits—Promoters' Account—Action by Company—Measure of Damages—Claims of Individual Members—Reservation of Rights.

Appeal by defendants from judgment of TEETZEL, J., in favour of plaintiffs in an action to recover secret profits payable by defendants in the sale of oil leases to a syndicate which was formed the plaintiff company.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, RIDDELL, J.:

D. Armour, K.C., and T. F. Slattery, for defendants.
H. Watson, K.C., and J. F. Edgar, for plaintiffs.

RIDDELL, J.:—This action arose out of a barefaced fraud practised by the defendants Cook (residing in the town of Marmora, in North Hastings) and Boerth (resident in Detroit.) Their victims were a number of persons in Ontario. . . . This fraud has been found by the

trial Judge; and before us no attack was made upon the findings. It appeared to me upon the whole that of the matters pressed upon us for the purpose of showing relevancy to the matters really in dispute, there was nothing being: "Granted the facts as found, can you proceed? Suppose that the defendants did do as they say, these gentlemen, must the relief given by the appeal be appealed from necessarily follow?"

The facts seem to be as follows. Cook and Boerth, of certain "oil leases" or an option in respect of (it is of no importance which.) He did not mention the question of selling out to a company which had offered to take over the property and to make a new company. He associated with him Boerth, who is a man of great tongue, and the two laid siege to a number of men, Cook's. Cook and Boerth represented that they had valuable oil leases, and invited these "fellows" to form a syndicate with them, paying \$1,000 each to form a company to take over these oil leases. This was one of the grossest frauds in their statement. They paid, giving a figure which was much in excess of the amount paid or to be paid. The friends were given glowing prospects held before their eyes. They paid \$1,000, and thereby became a member of the syndicate, entitled to a one-twentieth interest in the property. They were defrauded and cheated by the defendants. The effect was that, after the payment by each of \$1,000, he became a cestui que trust of Cook and Boerth. After the descriptions had been obtained, Cook started to "strike oil."

Then about 31st August, 1905, a meeting was held at the Rossin House (Toronto) by the members of the syndicate, or some of them, to take steps to form a new company. At this meeting false and fraudulent statements were made by Cook and Boerth as to the price of the oil. The statements apparently accepted as true by the members. A committee was selected to form the new company, this committee being composed of Cook and Boerth, against whom no imputation is made. On the 11th October, 1905, upon the application of the persons named by Mr. Edgar, but having no

t in the concern—they were merely selected for the constitution of the company.

a meeting of the board of directors of the company 13th November, 1905, an indenture of assignment es, dated 30th November, 1905, by Cook to the com- was read to the meeting.

s assignment recited that Cook was the holder of leases as trustee for himself and 19 other persons g them); that he, at the request and with the ap- of the said persons, had agreed to sell, etc., these to the company for \$60,000, to be paid by the issue 20 persons (including Cook) of 600 fully paid up shares 0 each, in equal proportions, i.e., 30 shares to each; en the indenture went on to assign over the leases to mpany.

on this indenture being read, the directors passed a No. 3, which recites that "Cook is the holder in of certain oil and gas leases . . .," and that holds the said leases in trust for himself and the fol- persons in equal shares, namely (naming 'them); and Cook, at the request and with the approval of the said persons, has agreed to sell . . . to the company or . . . \$60,000, to be paid by the issue to the said sons, including the said Cook, of 600 fully paid up shares of \$100 each, in equal proportions, that is 30 of such shares to each of the said persons," and said Cook has . . . assigned," etc. The by-law then d that 30 fully paid up shares should accordingly be to each of the 20 named persons.

e stock to be issued was fixed at \$60,000, instead of 0, as had been originally intended, because, as Mr. tells us, they had discovered oil, and consequently it ought that the leases which with oil undiscovered orth \$20,000, with oil discovered were worth 3 times ch. It would seem that everything in the way of g the company, making contracts . . . for and in ne of the company with Cook, the by-laws passed, etc., ne at the direction of Mr. Edgar.

e leases having cost a much less sum than represented defendants, and they having made up for and pre- at the meeting of the syndicate a false and fraudulent ent of such cost, what are the rights of the parties?

While it is manifest from the evidence of intention of Cook from the beginning to take over the leases, and while the receipts to his victims indicated this, it may not be that he must account for secret profits.

The receipts read: "Received from one thousand dollars in payment for a one-twentieth interest in certain oil leases consisting of 2,647 acres located in the county of Essex, Ontario, on or before the first day of September, 1900, by the said prospective company, absorbing the said oil leases, and to give to the said . . . authorized by the said prospective company to a one-twentieth interest in said company."

I take it that, all that was done in fact being done in pursuance of the agreement in the receipts, Cook not objecting, but himself forming the committee, the company must be considered as formed by Cook. Had he objected to the formation as it was, the case might be different in circumstances, he must be held to have failed in performance of his contract set out in the receipts. I consider it a matter of perfect indifference to nominal shareholders and nominal directors that Cook act for the company. Cook then was not only so far a "promoter" of the company; he distinguished this case in principle from *Graham v. [1900] A. C. 240.* . . .

[In *re Lady Forrest Gold Mine*, [1900] A. C. 240, distinguished.]

In the case now under consideration all the evidence, that there was the gross fraud upon those who were expected to form the company upon the formation of the company the representations were continued to the directors in that they were mere figure heads, and that Cook, the tort-feasor, and Edgar, his instrument,

But this resulted in the sale to the company, not of Cook and Boerth, but of a syndicate including these—and consequently (as regards the gain to Cook and Boerth was not the gain to the company) the pretended and actual price of the fractional portion thereof.

st they, then, account for the whole difference in price? so. It was their clear duty as trustees to have disclosed the whole transaction. Instead of that, they neglected and induce the company to purchase property as if it had been bought for \$20,000, which really cost much less. Measure of damages in that case would be the loss to the company, and that is the difference in value of the leases as represented. The value in fact, in the absence of other evidence, is the price paid, and therefore the amount Cook should pay the difference between the \$20,000 represented value and the actual amount paid for the property originally. In the circumstances of this case, no allowance should now be allowed as to the value of the leases.

Esche v. Sims, [1894] A. C. 654, may be looked at as supporting some remarks not inapplicable here.

I have read the many cases cited by counsel and some of them, but I find nothing authoritatively laid down opposed to the conclusions.

In addition to the claim of the company, it may well be that each of the persons defrauded has a cause of action. It is not the same cause of action as that of the company, and the trial Judge was right in not giving relief of that kind in this action. But the damage to these will not necessarily be made good by the payment to the company. They may have sold, or there may be other circumstances. The order of the judgment should have expressly provided that it was without prejudice to any action to be brought by any person claiming to have been defrauded. The position of the persons defrauded cannot be successfully distinguished from that of the company if they were partners in this fraudulent scheme.

On the modification mentioned, the judgment below should be affirmed, and the appeal dismissed with costs.

MR. JUSTICE LUTTON, J., gave reasons in writing for the same conclusions.

MR. JUSTICE CONBRIDGE, C.J., also concurred.

CARTWRIGHT, MASTER.

NOVEMBER

CHAMBERS.

HARCOURT v. BURNS.

*Executor—Renunciation of Probate —
 dling—Action on Promissory Note St
 as Executor—Personal Liability—Lea
 tional Appearance.*

Motion by defendant to set aside the
 and service thereof, or for leave to enter a
 ance.

W. H. Blake, K.C., for defendant.

W. H. Price, for plaintiffs.

THE MASTER:—The defendant is s
 the will of his brother. He moves, "pe
 executor," before appearance. . . .

One J. W. Burns died on 12th Novem
 made a will, of which the defendant was
 He never took out letters probate, the
 that he had made application therefor, a
 ary, 1907, he executed a formal renunc
 to have been filed in the Surrogate Cou
 wards. Thereupon, at the request of th
 administration with the will annexed w
 Toronto General Trust Corporation. I
 done, the defendant on 18th December, 1
 sory note to the plaintiff for \$2,000, whic
 cutor of J. W. Burns. This on 21st
 renewed in like form, and the renewal
 herein. . . .

It was argued for the plaintiffs tha
 had intermeddled, he could not be aft
 renounce: *Jackson v. Whitehead*, 3 Phill
 slight act of intermeddling with the s
 an executor from afterwards renouncing
 in *Cummins v. Cummins*, 3 Jo. & Lat.
 for the plaintiffs also referred to Will
 10th Eng. ed., p. 199, to the same effect
 a renunciation is not effective until rec
 until then it may be withdrawn. Went

p. 91-94, was cited as shewing what is such an
 thing as will preclude an executor from afterwards
 doing. To the same effect, it was contended, is the
 case of North, J., in *In re Stevens*, [1897] 1 Ch. 422,
 [1898] 1 Ch. 162 (see p. 171).

It will be for the plaintiffs to consider whether they
 ought to apply to have the grant to the Toronto General
 Corporation revoked, and the defendant required to
 state, or else have the corporation added as defend-
 ant in his action. It is not shewn whether the acts of the
 defendant were known to the Judge of the Surrogate Court,
 or of the papers leading to the grant are in evidence
 for revocation.

If one of these courses is not taken, it will be useful, if
 necessary, for the plaintiffs to consider whether a recovery
 in this action in its present form will be of any prac-
 tical benefit to the plaintiffs. . . .

The court seems right to allow the action to proceed if plaintiffs
 consent, giving defendant leave to enter a conditional
 judgment, so as to allow him to plead "ne unques execu-
 tor." I have the whole matter decided by a Court which
 has heard all the evidence to be given on both sides.
 If no consideration can be proved, might not the defendant
 appear personally, even if the estate is not held to be

that the defendant should appear forthwith. Costs will be
 in the usual course.

RIGHT, MASTER.

NOVEMBER 13TH, 1907.

CHAMBERS.

MADGETT v. WHITE.

Addition of Defendant—Agent—Authority—Costs.

Application by plaintiff for an order adding one Moore as a
 defendant.

John Phelan, for plaintiff.

John Smith, for defendants.

MASTER:—The case is ready for trial. . . . Moore
 is agent for defendants in the matter out of which
 the action arose. . . . The statement of claim alleges that

it was a term of the agreement between defendants should give plaintiff indemnity which the Goodison Co. might have agreed to. Moore represented that he had authority to so agree. It further states that defendants refused to give such indemnity, and repudiate the agreement to make any such bargain.

This statement of claim was delivered, and it was on account of the repudiation of the indemnity before action that the suit was instituted. Defendants are, therefore, at a loss to understand why Moore was not made a party in the first instance. It is regretted since to make the plaintiff wish to have Moore added.

It was further objected that this action was brought by the Goodison Co., and that it was not enough to bring in Moore when that was the case. Madgett. It does not concern us at present whether it is really. The plaintiff makes the giving of indemnity part of his agreement, and he gave the notes now sought to be recovered.

Moore might have been joined as a party in the first instance, and this would not have affected the judgments of the Chancellor in *Goodison v. Manufacturing Co.*, 1 O. L. R. 606, 614, and *ib.* 614. . . .

This being so, the only matter for consideration is the disposition of the costs. As plaintiff succeeded all along that defendants denied any liability, and to give a promise of indemnity, I think that the costs occasioned by this order should be awarded to the plaintiff.

ANGLIN, J.

Nov.

CHAMBERS.

CANADA SAND LIME BRICK CO.

*Mechanics' Liens — Statement of Claim
Time for Filing—Commencement of Action—Statute and Rules of Court.*

Appeal by plaintiffs from order of Master of the Court made ante 686, striking out the statement of claim.

Proudfoot, K.C., for plaintiffs.

A. McMaster, Toronto Junction, for defendants.

LIN, J.:—The proceedings are under the Mechanics' Lien Act to enforce a claim for materials. The last materials furnished by the plaintiffs were furnished on 30th May, 1907. The plaintiffs' lien was registered on 29th June, 1907. The statement of claim was filed on 23rd September, 1907.

Section 24 of the Mechanics' Lien Act, R. S. O. 1897, provides that "every lien which has been duly registered under the provisions of this Act shall absolutely cease after the expiration of 90 days after the . . . materials have been furnished or placed . . . unless in the meantime an action is commenced to realize the claim,"

Section 31 provides: (1) The liens created by this Act shall be realized by action in the High Court according to the procedure of that Court, excepting where the same is otherwise provided by this Act. (2) Without issuing a writ of summons, an action under this Act shall be commenced by filing in the proper office a statement of claim verified by affidavit.

In the present case the appellants it is contended that the 90 days allowed by sec. 24 must be computed exclusively of long vacation. If this contention is correct, the statement of claim was delivered in time; if not, the lien had ceased to exist before the statement of claim was delivered.

By Rule of the Supreme Court of Judicature No. 352, long vacation is to be excluded in computing the time appointed or allowed by the Rules for filing pleadings. The time in this case is appointed not by a Rule, but by statute. Rule 352, therefore, has no application.

Rule 351 prohibits the delivery of pleadings in long vacation except by consent or direction of the Court or a judge. I am informed that the practice in the central office is to receive and file statements of claim under the Mechanics' Lien Act during long vacation without such consent or direction. Assuming that Rule 351 would otherwise be applicable, sec. 31 excludes its application, if the practice prescribed by that Rule is varied by statute. The statute prescribes for the commencement of mechanics' lien actions a period of 90 days with-

out regard to vacations. This provision involves such a variation of the procedure in regard to delivery of pleadings as not to apply the application of Rule 351 to pleadings filed during vacation. (Were Rule 351 applicable, having been made subject to the unqualified terms of sec. 24 of the Act.) The court would, in my opinion, be bound to obtain the consent of the defendant or the direction of the court as to the filing of his pleading during vacation, and not to allow a default claim to have the time prescribed by the Act.

In my opinion, the decision of the court is right, and the appeal must be dismissed with costs.

ANGLIN, J.

NOVEMBER 1900

CHAMBERS.

REX v. FARRELL.

Liquor License Act — Conviction as for Sale of Liquor — Sentence to 4 Months' Imprisonment — Appeal — Charge under Habeas Corpus — Right to be Heard — Hind Conviction Regular on its Face — Police Magistrate — Clerical Error in Commitment — No Recorded Evidence — Prior Conviction — Provision of Act requiring Plea to be Taken down in Writing — Admission of Guilt — Variance between Information and Charge — Defendant not Allowed Fair Opportunity to be Heard — Refusal of Adjournment.

Motion by defendant, upon return of writ of habeas corpus and certiorari, for his discharge from the common gaol of the county of Peel, under the care of Robert Crawford, police magistrate for the county of Peel, for selling liquor without a license, and for conviction for a similar offence. The defendant was sentenced to 4 months' imprisonment as for a first offence, based his claim for discharge upon the fact that the police magistrate for the county of Peel had no jurisdiction, the offence being charged as

(1) That the police magistrate for the county of Peel had no jurisdiction, the offence being charged as

in the township of Toronto, and without the limits of town of Brampton.

That the warrant of commitment under which the is held bears date 7th October, 1907, whereas the conviction upon which the conviction is based was laid on 8th October, and the conviction bears date 9th October.

That upon the papers returned there appears no record of a former conviction.

That the inquiry as to a former conviction took place, and that the defendant had been found guilty upon the charge pending.

That he was not allowed a fair or reasonable opportunity to make his defence.

W. Blain, Brampton, for defendant.

R. Cartwright, K.C., for the Attorney-General.

MR. J. L. LIN, J.:—The following facts are established by the evidence before me:—

The information as originally laid appears to have been for offences committed in the township of Toronto on 7th October. The summons served upon defendant on the afternoon of 8th October required him to answer on that day a charge laid in these terms. Upon being so charged the defendant immediately telegraphed his solicitor, Mr. Blain, notifying him that he wished him to attend at Brampton court house on the following afternoon. In the afternoon he received a telegram requesting him to meet Mr. Blain at Brampton in the morning. He did so, and, having for the first time informed Mr. Blain of the nature of the charge laid against him, learned that it would be impossible for Mr. Blain to attend in the afternoon, owing to a previous engagement requiring his presence in the city of Toronto. Mr. Blain explained to the defendant the steps that it would be necessary to take to properly present his case, including having an analysis made of the beverages consumed by him, in order to shew that they were non-intoxicating. The defendant contending that he had sold only "local beer," which he alleged to be non-intoxicating. Mr. Blain and the defendant then attended on the police magistrates and Mr. Blain explained to him the reasons why he would be unable to be present at the trial in the afternoon. In any event, he could not be prepared to proceed with the defence at the time appointed, and requested an

adjournment to afford an opportunity of defence. Mr. Blain urged the magistrate to telephone to Mr. Ayearst, the provincial prosecutor, notifying him that the proceedings go on at the time appointed, and would the magistrate refused to communicate with him, declined to consent to any adjournment. When he left town immediately, Mr. Blain the defendant a letter addressed to Mr. Ayearst, explaining to him the position, and asking him in favour of an adjournment, expressing his willingness to wait a future date which might suit the convenience of the prosecutor and the magistrate.

The defendant attended, pursuant to the summons, upon him, at the court house in Brampton, in the afternoon of 9th October, 1907. He showed Mr. Blain's letter to Mr. Ayearst. He again requested an adjournment. The magistrate refused, and gave no explanation of the defendant that he had no money to get his case or advise him, the magistrate said he would get a lawyer for him. He then left the court. On his return informed the defendant that Mr. Ayearst, the prosecutor of Brampton, would be present in court on the 11th, that he could have Mr. Morphy act for him.

When Mr. Morphy appeared, the defendant explained to him his desire for adjournment. Mr. Morphy offered an adjournment, which the magistrate refused. Upon Mr. Morphy persisting in his demand for an adjournment, the magistrate offered to grant an adjournment, upon payment of costs of the day, which he said was \$10. The magistrate says in his affidavit that he proceeded with the case rather than pay the costs. The defendant, on the contrary, says that he was willing to pay the \$10 rather than have the trial on that day, but that the magistrate refused his (defendant's) readiness to pay, then adjourned the case, and directed the trial to proceed on the 11th.

Mr. Morphy, for the defendant, took the stand, and gave information upon which the magistrate found the defendant, which, as it appears, as then framed, charged the defendant had committed the offence of selling a license "between the 1st and 8th days of October." Thereupon the information was changed to "between the 1st and 8th days of October, 1907."

endant with selling intoxicating liquor without license
October, 1907. Notwithstanding this amendment,
the making of which the defendant again pressed for
ournment, representing that with the date thus fixed
d produce a witness who could give material evidence
behalf, the magistrate refused to adjourn, and pro-
with the trial.

e evidence taken was sufficient to warrant a conviction
ling liquor without a license. The notes, however,
rned, disclose nothing in regard to any prior convic-
The magistrate makes affidavit that after he had found
ant guilty he asked him whether he had been pre-
convicted of a similar offence, to wit, on 30th March,
and that the defendant then admitted that he had
previously so convicted. The magistrate adds that this
ion was not reduced to writing, and was inadver-
omitted from the evidence. The defendant, however,
at "immediately after I gave my evidence, and be-
anything further was done by the magistrate, I was
by . . . the magistrate if I had been previously
ed, no time being mentioned as to when I was con-
and I denied having been formerly convicted, where-
ohn D. Orr, license inspector for the county of Peel,
led as a witness and sworn, and some questions asked
nd I was then asked what I had to say to that, and
not reply."

John Ayearst makes affidavit corroborating the mag-
as to the defendant having declined to accept an ad-
ent on payment of \$10 and as to his admission of
ous conviction. Except upon these two points, the
t of the defendant as to what took place before and
his trial is uncontradicted.

information returned with the papers refers to the
conviction of the defendant as a conviction for hav-
unlawfully sold intoxicating liquor." The conviction
d refers to the former conviction as a conviction for
"unlawfully sold intoxicating liquor without the
therefor by law required."

nsel for the Crown contended that the conviction
d being upon its face regular and sufficient, the
should not, on a motion for discharge under habeas
go behind the conviction and consider the sufficiency

of the evidence to support it. While many authorities that the Court will not re-hear the case or weigh the evidence of some of the same authorities it is clear that the Court will examine the depositions, any evidence to sustain the conviction found, will discharge the prisoner, "sensible that a person should not be detained in a conviction which would be quashed if the Court in another form." Of these authorities to refer to *Regina v. St. Clair*, 27 A. C. 1, the sentence that I have quoted is taken from *Ex p. McEachern*, 17 C. L. T. Occ. N. 10 O. L. R. 718, 6 O. W. R. 746, 10 Can.

Indeed, our statute authorizing the writ of certiorari in aid of habeas corpus (R. S. O. 1897 ch. 87, s. 5) states the object of conferring this power on the Court may view and consider the evidence in the conviction, and all the proceedings, to the effect and sufficiency thereof to warrant the confinement or detention. Without authority, the very language of the actment would seem to require, when presented to the Court pursuant to the writ of certiorari, that the Court look into them, and should, if it finds the evidence and depositions inadequate to sustain the conviction, discharge the prisoner.

There does not appear to be any similar provision in England, and there the return of a writ of habeas corpus is valid and binding whether there be a question of jurisdiction, a conviction or a motion for discharge on habeas corpus. A similar statutory power exists in the United States. The Court fully accounts for the decision in *Ex p. McEachern*, 12 S. C. R. 113.

(1) Robert Crawford . . . is police constable in the town of Brampton. H. H. Shaver . . . is a constable for the township of Toronto, in which he is charged to have been committed. The Court held that Mr. Crawford sat at the request of Mr. Shaver. Mr. Crawford's jurisdiction to try the case was open to question: R. S. O. 1897 ch. 87, s. 5.

Holmes, 14 O. L. R. 124, 127, 9 O. W. R. 750; R. 1897 ch. 245, secs. 97, 101.

I cannot regard the dating of the warrant of commitment as of 7th October as anything more than a mere clerical error. This certainly would not warrant the charge of the prisoner held under the warrant. The error only appears upon examination of the conviction referred to the writ of certiorari, and is such that no Court would hesitate to permit it to be cured by amendment.

Section 99 of the Liquor License Act (R. S. O. 1897 ch. 245) requires that "the justices shall in all cases reduce to writing the evidence of the witnesses examined before them, and shall read the same over to such witnesses, who shall sign the same." The Ontario Summary Convictions Act (R. S. O. 1897 ch. 90), prescribes that magistrates trying cases against Ontario statutes shall, as to procedure and conduct of the Court, comply with the requirements of the Ontario Criminal Code respecting summary convictions. The Criminal Code, sec. 721 (3) and 683, the magistrate is required to put the evidence taken by him in writing.

For the first offence of selling liquor without a license the offender is liable to a maximum penalty of \$100 and fine, and is liable to imprisonment only in default of payment. For a second offence he must, on conviction, be sentenced to 4 months' imprisonment: R. S. O. 1897 ch. 241, sec. 2. The proof of the prior conviction is, therefore, of the utmost importance when a charge is laid as for a second offence. In fact such proof is essential to the jurisdiction of the magistrate to impose imprisonment. Having regard to the requirements as to taking the evidence in writing, I think, clearly the duty of the magistrate to put in writing, as part of the evidence in this case, the admission of the accused or the testimony of the inspector, Mr. Orr, if ever it was—upon which he found that the accused had been previously convicted of a similar offence. The return that he failed to do so. It would, in my opinion, be unsafe to permit the evidence returned to be supplemented here by affidavits of the magistrate and the prosecutor as to what evidence was given or what admissions were made by the accused at the trial, upon this vital matter. I decline to do so.

The magistrate proceeded as required by the statute (R. S. O. 1897 ch. 245, sec. 101), after finding the accused

guilty upon the pending charge, he could not say "whether he was previously convicted or not." In the information returned against the defendant the allegation as to previous conviction was that the accused was formerly convicted before a police magistrate for the township of ... on 11th March, 1907, sold intoxicating liquor to the defendant, upon being asked by the magistrate whether he had a previous conviction as alleged in the information, the defendant admitted might well have been something more than a mere pretence from selling without a license, because it is well known that liquor may be sold unlawfully by persons holding a license. The magistrate had no personal knowledge of the defendant as was the case in *Regina v. McGarry*, 31 O.R. 241, where the defendant's conviction had to be either admitted or proved by competent evidence. If, as his affidavit sworn to by the defendant "if he had previously, to wit, on 11th March, 1907, been convicted of a similar offence, he admitted parted from the statute, in that he inquired whether the offence other and different from that alleged in the information. If he followed the statute and insisted on the prior conviction as alleged in the information, he obtained an admission which was entirely sufficient. The defendant would make it still more dangerous to accept the defendant's affidavit as to what transpired, in the absence of any evidence which the statute required him to make. The magistrate's sentence returned to warrant the conviction for the offence of selling intoxicating liquor without a license, was essential to support the adjudication of 4 months. It follows that the defendant is entitled to discharge upon this ground.

(4) It is not necessary to deal with the question whether had the return shewn evidence or an admission of a previous conviction for the like offence, I should have accepted the magistrate's statement as to the facts and the findings at which such evidence or admission was based.

(5) Perhaps the most serious complaint against the proceedings, however, is that he was not allowed fair opportunity to make his defence. His statement that he was served at which he was served—his inability to procure the assistance of his own solicitor—his repeated refusal to appear for judgment—the refusal of the magistrate to accept his defence at the time—stand uncontradicted. The offer made

to grant an adjournment on payment of \$10—even if withdrawn, as the accused swears it was—scarcely deserves consideration. The defendant was served on one afternoon in Streetsville to answer a charge on the next afternoon in Brampton. His solicitor was unavoidably absent. The proposed defence, if honest, required an analysis of the pages he had sold to support it. These facts were all related to the magistrate. Upon the opening of the trial information which the defendant had been summoned to answer, and which charged two offences, in contravention of s. 710 (4) of the Code, was amended so as to charge one offence, and that on a date different from either of the dates fixed in the summons served. The defendant was then for the first time made aware of the actual charge which he was summoned upon to meet. Yet he was refused even an adjournment of a few hours, and was compelled to proceed with his trial without witnesses, without opportunity to present a defence, apparently substantial and bona fide, and defended by counsel chosen not by himself but by the magistrate who tried him.

Section 713 of the Criminal Code enacts that “the person against whom the complaint is made or information laid shall be permitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor, or agent on his behalf.” And sec. 104 of the Ontario Liquor License Act permits the amendment of informations before judgment only upon the terms that “if it appears that the defendant has been prejudiced by such amendment . . . the magistrate shall thereupon adjourn the trial to some future day, unless the defendant waives such adjournment.” The defendant was, in the circumstances of this case, entitled to a reasonable adjournment, not of grace, but as of right—not upon terms, but unconditionally. To refuse to grant such adjournment was in effect to deny him that opportunity “to make full answer and defence” which the Code says he shall have. The distinction between pressing on proceedings so that the defendant has no reasonable opportunity to make his defence, and refusing to hear a defence which he offers to make, is more apparent than real. I have rarely heard of any judicial authority being more arbitrarily and unfairly exercised than it appears to have been by the police magistrate in this case. His course was entirely contrary to

the spirit which happily pervades the justice in this country. While inclined, to disregard trivial and highly technical objections, and, even when obliged to quash the verdicts of magistrates when they err through inadvertence, while honestly endeavouring to discharge the best of their ability, Superior Courts cannot but regret and deplore such a lack of fairness and such a departure from the rules of elementary justice as these proceedings present. To permit the confinement of the defendant, "would, under the circumstances, be a denial of justice and to the principles of our law." 10 O. R. 727, 733.

An order will issue for the discharge of the defendant from custody.

ANGLIN, J.

Nov 1890

WEEKLY COURT.

RE SILVERTHORN.

Will—Construction—Devise—Life Estate—Disposition of Proceeds.

Motion by the executors for the order upon the construction of the following will and testament of James F. Silverthorn.

"To my dear wife Elizabeth A. Silverthorn I devise all my personal estate of every kind for her own use, and that my landed property and that may be coming due on the Samuel Silverthorn shall be disposed of after the death of the said Elizabeth A. Silverthorn to be made into 15 parts, of which 15 parts each shall receive two-fifteenth parts and each one-fifteenth part, and that for as long as Elizabeth A. Silverthorn lives she shall have the use of the property, and either use it, rent it, or dispose of the money as she thinks best."

W. E. Middleton, for the executors.

W. H. Blake, K.C., for Elizabeth A. Silverthorn.

GLIN, J.:—The absolute title of the widow to the property is admitted. As to the Samuel Silverthorn mortgage it was conceded by counsel for Mrs. Elizabeth Silverthorn that she took only the income thereof for life. The question for consideration is as to the disposition of the landed property.

Mr. Blake, for the widow, asks a declaration that she is entitled absolutely to this property. On the other hand, Mr. Addleton, representing the executors, submits that she takes a life interest in it. I have examined *In re Jones*, 11 Ch. D. 1, *Richards*, [1898] 1 Ch. 348, *Lloyd v. Tweedy*, 11 Ir. R. 5, *In re Richards*, *Uglove v. Richards*, [1902] 1 Ch. 166, and *In re Tuck*, 10 O. L. R. 309, 6 O. W. R. 150, and the counsel. I have also considered *Espinasse v. Luffington*, 10 Jo. & Lat. 186, *In re Bush*, [1885] W. N. 61, and *Pounder*, 56 L. J. Ch. 113. As pointed out in more than one of these cases, this testator, when desirous of making an absolute gift of property, knew how to do so, as evidenced by his disposition of the personal estate.

Is it not for the concluding words of the devise of the property—that she may “sell (it) and use the money as she thinks best,” there would be no room for the contention that the widow has more than a life interest in the property. Mr. Blake, however, argues that the right of the widow, as he puts it, to use the money arising from the sale of the realty as she thinks best, is inconsistent with any limitation upon her interest in the property itself. It is a cardinal rule of construction that effect must be given, if possible, to every disposition of property made by a testator; that no words of disposition, no portions of a will are to be rejected or deemed inoperative, if it is possible by putting upon other portions of the documents a reasonable construction, to remove apparent inconsistencies and make them effective. If the contention presented by Mr. Addleton of the widow is to prevail, the careful directions of the testator as to the disposition of his landed property after his wife's death, and its division into 15 parts, of which the sons shall receive each two-fifteenth parts and the daughters one-fifteenth part, would be entirely ineffectual and inoperative. It is impossible to suppose that if the testator intended to give to Elizabeth A. Silverthorn the entire interest in his landed property, he should have made this disposition upon the assumption that there would

still be some remaining interest in the land, which might in that event be the subject of sale for herself. As pointed out in several of the preceding paragraphs, the disposition in favour of the sons and daughters is repugnant and invalid for uncertainty, as intended to operate only upon such proceeds as might be received from the sale of the landed property, as might remain after the death of Elizabeth A. Silverthorn, she having the right to use, in her lifetime, any part of such capital. This, therefore, is the construction to be favoured.

If the words "as she thinks best" relate to the money made of the money arising from the sale of the land, it might be difficult to maintain that the construction is not absolute. These words, however, relate to the use to be made of the money. They relate to the widow's option to use the land, or to rent it, or to sell it. Any one of these would do "as she thinks best," and this qualifies her own interest being a life interest only. If, on sale she is given the use of the money, and if on not selling she is given the use of the land, the testator apparently applies the word "use" to the proceeds of the sale of the land, standing in the land itself—in the same way as he applies it to the land. The widow, I think, is limited to the income to be derived from the investment. If, should she sell the land, her discretion as to the manner, and kind of investment being applicable. As already pointed out, it is impossible to construe the disposition in favour of Elizabeth A. Silverthorn as giving her property in any other way without rejecting the preceding disposition in favour of the sons and daughters.

For these reasons, in my opinion, the construction in favour of Elizabeth A. Silverthorn in the landed property is declared to be a life interest only, with the right to use the land, if she so desires, and, in that event, to have the proceeds as she deems best, and enjoy the same during her life. Costs out of the estate, those of the executors and of the client.

r, J.

NOVEMBER 15TH, 1907.

CHAMBERS.

RE ARGLES.

*Custody—Issue between Parents—Welfare of Child
Custody Awarded to Mother—Terms—Access of Father
Costs—Direction for Sealing up of Papers.*

tion by the mother of the infant Marion G. Argles
order awarding her the custody as against the appli-
cand, the father of the child.

George Bell, for petitioner.

D. Montgomery, for respondent.

GLIN, J.:— . . . While I entertain no doubt as
proper conclusions upon the issues of fact presented,
in from formulating my findings, solely because, if
ed, they must unavoidably reflect seriously upon the
character, the habits of life, and the conduct of the
ent. The possibility of an appeal from the order
I shall pronounce would afford the only reason for
ther expression of my views upon the evidence. But
ellate tribunal dealing with this evidence, all upon
ts, will have the same opportunities and facilities
have for forming a correct appreciation of it.

welfare of the child—in this case a girl 8 years of
the supreme consideration in determining, as be-
father and mother, who are living apart and whose
differ, to which parent its custody shall be intrusted:
ng, 29 O. R. 665; Re Davis, 25 O. R. 579; the wel-
the child in the largest and widest sense of the
e McGrath, [1893] 1 Ch. 143.

ough Dr. Fisher, her own physician, had already
that the petitioner is now mentally sane and in a
of health to be intrusted with the care of her child;
ri cautela, the petitioner having been for some two
1903-05) a patient in the Minton Asylum for the

Insane, I asked for a report from Dr. Beemer, the superintendent of that institution, upon her present condition. An eminently satisfactory report, shewing that the child has been most thorough, Dr. Beemer stated that there was no reason to doubt Mrs. Argles's present sanity, and fitness from a medical point of view to be entrusted with the care of her child.

Upon the material now before me I find that the care and custody of her daughter should for her safety be committed to the petitioner. I am satisfied that the father is not a suitable person to assume the responsibility of caring for and supervising the education of this young girl. His past conduct was very objectionable. His present mode of life—without any regular occupation—a mere lodger in a boarding house—renders him unfit. The age and sex of the child but confirm this view.

The child will now be delivered to the petitioner. An order will issue that she shall have its custody, subject to further order. Provision is made that the father shall have access to the child, and may see it at the home of the mother, at such time as may suit her convenience, not more than once each week. The material now before me is not sufficient to enable me to pronounce any order as to the payments by the father for the maintenance of the child. Leave will, however, be reserved to the court to make an order at any time for such an order.

The respondent must pay the petitioner's costs of this application, including Dr. Beemer's fee for his report made pursuant to my direction.

In the interests of the child I direct that the material filed in connection with this application be sealed up by the clerk and forwarded to the central office, to be kept under seal unless required for use on an application for an order, or for future use in other proceedings before the Court.

NOVEMBER 15TH, 1907.

C. A.

REX v. MOYLETT AND BAILEY.

Law—Keeping Common Betting House—Peripatetic Bookmakers Making and Recording Bets on Race of Incorporated Association—No Booth or other Structure — “House, Office, Room, or other Place”—Criminal Code, secs. 227, 228.

stated for the opinion of the Court by the police for the city of Toronto, after conviction of the defendants on a charge of keeping a disorderly house, to wit a betting house, at the Toronto Woodbine race track. The charge was laid under secs. 227 and 228 of the Criminal Code, S. C. 1906 ch. 146, which correspond with secs. 198 of the former Code.

The case was heard by MOSS, C.J.O., OSLER, GARROW, and THOMAS, JJ.A., and ANGLIN, J.

For the defendants, RITCHIE, K.C., and T. C. ROBINETTE, K.C., for defence.

For the Crown, CARTWRIGHT, K.C., and E. BAYLY, for the Crown.

The findings of fact set forth in the judgment of the Court raise once more, though under a somewhat different aspect, the vexed question as to the meaning and effect of secs. 227 and 228 of the Code. We had occasion to consider them recently in . . . Rex v. Saunders, 12 O. W. R. 534, affirmed in the Supreme Court, 1907, R. 382. In the present case the question is free from the complications introduced by sec. 204, now 235 (2). The most important findings of fact are the following,

The Ontario Jockey Club, a duly incorporated racing association, own and control the Woodbine racecourse. The defendants, in which the Crown seeks to convict the defendants, were charged with having been present upon the racecourse upon which a race was run during the actual progress of a race meeting, and having during the race meeting those of the general public

desirous of seeing the races were a enclosure, spoken of as "the general every part of it, including the large open space in front and to the east of payment each day of an entrance fee in the enclosure or the open space the purpose of making bets. Among usual admission fee from day to day v bookmakers, who laid bets with such as desired to bet with them.

The defendants were bookmakers, who did bet from day to day, through members of the general public who paid for admission to the enclosure.

The greater part of the betting d was done in an uncovered and unfenceral fenced enclosure—about 1-6 of the easterly part of the general enclostering was done in another portion of t sure in front of the grand stand. Th assistants did not use any desk, stool, u or erection of any kind, to mark any made. No part of the general enclos cated to the defendants or any other not restricted as to the use of any p enclosure, and no one had any rights The defendants did not occupy a fix their bets moving about within a s was nothing in or on the ground the defendants could be found. Th assistants during the betting on each possible about the same spot in a r feet. There were 50 of these bookma ants operating mainly in about 1-6 of

The bookmaker carried in his ha which was written the names of the horses, odds, etc. The cashier's ba and 3 or 4 assistants stood close toge had advance information in reference jockeys, weights, etc., procured from obtained from the Jockey Club the c information.

in this statement of facts it may be conceded that the persons were present in the enclosure, with all necessary furniture and equipment, for the purpose of betting, and they did enter into bets with all such members of the public within the enclosure as were disposed to deal with them. But the question is, whether what has been done has been done by the defendants constitutes the opening of a disorderly house, to wit, a common betting house. Within the meaning of the two sections of the Code under which the conviction has been made.

While considering this question, the general definition of a common betting house, given by sec. 227, viz., a house, room, or other place opened, kept, or used for the purpose of betting between persons resorting thereto and the occupier, or keeper thereof, any person using the premises, any person procured or employed by or acting for or on behalf of any such person, or any person having the management, or in any manner conducting the business thereof, is borne steadily in mind, there can be very little difficulty in reaching a conclusion.

Set apart from the authorities by which we are bound, the facts themselves seem almost naturally to suggest a conclusion of some sort, and to import fixity or localization. They also import rights peculiar to the person designated as occupier, occupier, or keeper, which rights are not shared by others. It is obvious that there must be not only a house, office, room, or other place, but it must be one capable of being opened, kept, or used for the purpose of betting. There must also be some person who is entitled to exercise the right of opening, keeping, or using, to the exclusion of the exercise of a similar right by others except with his permission.

Never doubts may have been entertained upon these facts before the decision of the House of Lords in the case of *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, affirming the decision of the Court of Appeal, A. C. 143, must now be considered as settled by the result of that case. And, unless the findings of the special case disclose a condition of affairs different from that appearing in that case, the conviction cannot be set aside, for in the main the facts of that case correspond with the findings of the special case.

There are no facts found which w
ing an inference as to the enclosure in
user made of it by the defendants, c
was held to be the proper one in the

In this case it is not and could not
that the defendants could be regarde
piers, or keepers of the enclosure.

The contention is that the use m
of a portion or portions of the encl
portions "a place," and made the defe
within the meaning of the sections.
the Crown, argued that, taking the
that the defendants did not occupy
made their bets moving about withi
there was nothing in or on the groun
the defendants could be found, along
ment that the bookmaker and his ass
ting on each race stood as much as p
spot in a radius of from 5 to 10 f
should be that the defendants had
place" corresponding in its use to a
other structure stationed on the grou
attracting people to it in order to be
other bookmakers and keeping withi
feet was so localizing his business t
fixed and ascertained spot, and there
the language and meaning of sec. 22

Hawke v. Dunn, [1897] 1 Q. B. .
more nearly resembled this case th
numerous cases in which the questio
in the Courts in England, was expr
Kempton Park case. . . . And i
now be regarded as binding authority
more than the mere presence of the
to indicate that measure of localizatio
right of user which is necessary in c
place." Dealing with the question of v
said in the Kempton Park case, [189
"The facts seem to me to shew tha
makers described in the evidence does
use any part of the enclosure as h
against any one. To say that he use
spot of ground on which he is at the n

office, or place exclusively, as against all the world, were his room or office, is beyond reason." This . . . seems to cover the present case, and is of the question involved.

question submitted should be answered in the negative and the conviction quashed.

ER and MEREDITH, JJ.A., each gave reasons in writing the same conclusion.

ROW, J.A., and ANGLIN, J., also concurred.

NOVEMBER 15TH, 1907.

C. A.

FAULKNER v. CITY OF OTTAWA.

*Local Corporation—Sewer—Sufficiency—Backing up
into Cellar of House—Extraordinary Rainfalls—
Negligence of Corporation—Non-liability of Corporation.*

deal by defendants from judgment of TEETZEL, J.,
B. 126, awarding damages to the plaintiff.

appeal was heard by MOSS, C.J.O., OSLER, GARROW,
REN, and MEREDITH, JJ.A.

E. Middleton and T. McVeity, Ottawa, for defendants.
F. Henderson, Ottawa, for plaintiff..

S, C.J.O.:—The plaintiff is tenant of shop premises
on the south-east corner of Clarence and Dalhousie
in Ottawa. A sewer constructed by the defendants
the centre of Clarence street, and the plaintiff's
s are drained by means of a drain pipe connecting
with the sewer. Through this drain pipe flows the
water, the water from the roof of the building, and
age from the closets on the premises.

plaintiff's complaint in this action was that on the
of 30th June or the morning of 1st July, 1903, and
August and 2nd September, 1904, the basement of

his premises was flooded and a quantity or destroyed by water backed up from the drain pipe upon his premises.

In the statement of claim it is alleged and backing up complained of resulted of the defendants, and a history is at struction of and dealing with the sewer but the vagueness of the statements dates render it difficult to follow.

The evidence, however, shews that t constructed along Clarence street, one 1885 under by-law No. 610, and the by-law No. 1175.

The first sewer was constructed in t having a diameter of 18 inches, the a diameter of 15 inches, but it was one plan and as one work. This se to the part of Sussex street on which th are situate. The work was done accordin by the then city engineer, and it is there was any departure from the pla or workmanship. Its capacity appears lated and the sewer designed in accord ard recognized at that date by engineer age construction, and it is scarcely c time it was constructed it was a suffici area it was intended to serve.

The sewer constructed under by-l inches in diameter, and extends in front mises and for 700 or 800 feet beyond th It is with this part of the now one co the plaintiff's premises are connected somewhat vague, but it would seem th from the plaintiff's premises was used c drainage from the basement or cellar a the closets. Later the drain pipe from into the same drain. So far as the only uses to which the 12-inch sewer al was put were of the same kind. There sewers or drains of the nature of sewer cording to the testimony of defendants' are 104 buildings on Clarence street, spouts, of which 6 are directly or indir

er. In the other cases the water is carried from the and rear of the roofs to the ground, the fall from the roofs going towards Clarence street, and that from the eaves running in the other direction. The sewage is a very small percentage of the flow. The chief flow is from the roofs and natural seepage.

In 1903 the defendants put down an asphalt pavement and granite sidewalks on Clarence street, with a number of openings or openings for the escape of the surface water into the sewer. Before that time the plaintiff seems to have experienced no serious trouble, though, according to the testimony of Oliver Paquet, a salesman in the employ of the plaintiff, and who was one of his witnesses, there was no flooding in 1896, 1898, and 1901 or 1902. This witness was not in the plaintiff's employ in 1901, and it is not explained how he was able to speak of 1896 and 1898. However, beyond some complaint, no action was taken concerning any flooding prior to that of 1903, and there is nothing in the evidence to account for the earlier cases, if they actually happened.

The construction of the asphalt pavement and the granite sidewalks is now put forward by the plaintiff as a very important factor in bringing about the flooding of which he complains. He charges that the flooding is due to the defendants' action in laying down the pavement and sidewalks without providing for the additional burden thus added upon the sewer with which the plaintiff's premises are connected. On the other hand, the defendants contend that the sewer system, as it exists at present, is quite sufficient to deal with the usual and ordinary rainfalls, and that the flooding was from which the plaintiff suffered on the days specified was extraordinary and unusual and such as would not have been reasonably anticipated by a competent engineer in providing a sewer system for the area of which the plaintiff's premises form part. It is agreed on all hands that the object of the work done in 1903 has been to produce a greater and more rapid flow of surface water into the sewer. The weight of evidence is that, as a consequence, no less than 50 to 75 per cent. of rain falling upon the street finds its way into the sewer, a great, or at all events considerable, increase on the quantity formerly finding its way to the surface. This change in the conditions, it is admitted, was not

contemplated or provided for when the sewer was constructed, and was not dealt with by the original asphalt pavement and granolithic sidewalk.

There is a conflict of testimony as to the changed conditions, the capacity of the sewer to carry all the flow occasioned by such a storm as may be usually expected in the city existing in and in the vicinity of Ottawa. That, according to the now recognized engineering rule, engineering to provide for a rainfall of 1½ inches an hour, the defendants' city engineer admits that in constructing the sewer he would not build it to carry more than 12 inches an hour, conceding that the 12-inch sewer was constructed in accordance with the engineering rule then prevailing, to provide for a fall of one inch an hour. The defendants have given evidence to show that the sewer is capable of carrying off the water resulting from a rainfall of much as 1½ inches an hour.

On the other hand, skilled and experienced engineers testify to the contrary view, and, balancing the conflicting statements, it would seem that the law has established, as a scientific proposition, that in this branch. But, as a matter of actual fact, the ponderance of evidence goes to shew that the rainfall of the 3 occasions now complained of was not sufficient. And with much deference, the court, of the evidence, to agree that the rainfall of the 3 occasions were not of such a character as to be extraordinary and unusual storms. As to the storm of June, it is shewn that for a time between 1 and 2 o'clock in the afternoon the rainfall was at the rate of 1½ inches an hour, and it was at or about this time that the storm occurred. The other storms, though not of the same first, were very severe, and there seems to be no doubt that each fall exceeded the rate of 1½ inches an hour. But, according to all the scientific evidence, a competent engineer constructing a sewer for Ottawa would be acting with proper skill and judgment with good engineering if he provided for a rainfall of 1½ inches an hour.

In this case I think that while the sewers were not so constructed, probably because of the cost of their construction the engineering rule

red, and while the new pavement and sidewalks
 ered the conditions as to render necessary a capa-
 inches an hour, the plaintiff's damage was not
 e deficiencies, but to the extraordinary and un-
 cter of the rainfalls, and the abnormal strain
 pon the sewers.

rom these occasions, there is really no evidence
 t the sewers have failed to answer their purpose,
 ding the additional burden imposed by the new
 nd sidewalks.

bt, their presence conduced to the rapidity with
 sewer filled and backed up the waters on these
 out it is not shewn that the same flooding would
 ned if the rainfalls had been less or more than
 of $1\frac{1}{2}$ inches an hour.

nable to find in the evidence any proof that after
 ction of the 12-inch sewer there were other sewers
 ry drains led into it. The only substantial in-
 mand on its capacity was that occasioned by the
 ent and sidewalks, and, in my opinion, it has not
 that such increase was the cause of the flooding
 ne plaintiff complains.

the appeal should be allowed and the action dis-
 n costs throughout.

TH, J.A., gave reasons in writing for the same

REN, J.A., also concurred.

and GARROW, JJ.A., dissented for reasons stated

NOVEMBER 15TH, 1907.

C.A.

BOWMAN v. SILVER.

*Trustees—Action against Executors to Establish
 — Purchase by Second Mortgagee of Mortgaged
 es from First Mortgagee—Alleged Trust for Mort-
 —Failure of Evidence to Establish—Unexecuted
 ent—Corroboration—Statute of Frauds—Pur-
 f Chattels—Account.*

by defendants and cross-appeal by plaintiffs from
 ent at the trial of TEETZEL, J., in an action

against the executors of Isaac Silver dealings with certain chattel property by the plaintiff A. M. Bowman, and of certain lands also at one time owned by the wife and co-plaintiff, and for a declaration that such lands to the extent of a one-half interest should be reconveyed to the plaintiffs by reconveyance or sale. TEETZEL, J., dismissed the plaintiffs' claim relating to the chattel property, but granted that Isaac Silver held the real estate (subject to the incumbrances) as trustee in equal shares for himself and himself.

The appeal was heard by MOSS, C. J., MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., and H. E. ... for defendants.

G. H. Watson, K.C., and Irving S.

GARROW, J.A.:—Isaac Silver died in 1903, and defendants are the executors of his will.

The sale of the chattels at which ... said, upon account of Bowman, and in ... account was asked, took place as far back as 1893. And, in the circumstances, I am of opinion that the reasoning of the learned Judge and in ... relief in respect of that transaction. ... however, was of the opinion that as ... were entitled to the relief claimed, ... I am, with deference, unable to concur.

The lands . . . were subject to a mortgage to a loan company for \$10,000, and also, ... a second mortgage to Silver for \$4,800 ... cent. Default having been made in payments, the mortgagees served a notice of sale under the mortgage, and on 13th June, 1893, ... the lands to Silver for the expressed consideration.

The plaintiffs in the pleadings ... prior to the sale it was agreed between them ... that he should manage the lands as

ould become responsible to the mortgagees for payment of the mortgage money and interest, and that the proceeds might be derived from the lands should be shared between the plaintiffs and Silver. And that subsequently, and before the sale, it was further agreed that if deemed it necessary for the better management of the property he should be at liberty to take a conveyance in his own name, and that he should hold and manage the property as trustee for the purposes aforesaid.

And this is the trust to which effect has hesitatingly been given by the learned Judge. In his judgment he said that he had to depend alone upon the evidence given by the plaintiffs. He would have had great hesitation in believing that such an arrangement was made. But, as he further said, he regarded the evidence of the witnesses Wallace, Leveson and Sheppard, as pointing to the conclusion that Silver was holding the lands for the benefit of Bowman upon an understanding between them, and therefore that such evidence was corroborative of the evidence of the Bowmans as to the specific trust alleged in the pleadings and supported by the evidence.

Reference is made in the judgment to the defence of Statute of Frauds, which was pleaded and was also relied upon in the argument before us.

We will deal first with the facts which appear to be established by the evidence. The trust, whatever it was, was entirely verbal; there is not a particle of anything in writing, contemporaneous, or subsequent, to which we were referred, which supports or in any way tends to support it, except the unexecuted paper prepared by Mr. Wallace, the solicitor for the male plaintiff. And the only verbal evidence which pretends to set forth the nature and terms of the trust is that of the plaintiffs themselves. Mrs. Bowman, whose name the property stood, said that she remembered an interview at which her husband and Silver were present, and she only speaks of one interview. At that interview, the date of which she could not remember, she said that he thought if he had the running of the property he could run it in a better way and "help us every year." And he used that offer "so that I would sign the paper." . . . "He said that if I would sign off these papers . . . he thought it would be for the benefit

of both of us if I would sign this. . . when the property was sold and things to have our share of it as well as his share spoken of?" A. "Well, we always be half, and he *thought* it would thought?" A. "Mr. Silver." Q. "W" "That is just the words he used." word 'half' or 'share?" A. "Yes, yes." Q. "When was that to be?" A. was sold." Q. "And was there anything would be sold?" A. "No, whenever he it." In cross-examination she admitted was aware that the loan company were and threatening to sell, and hearing had been served. She does not explicit at that interview execute the "paper" the fair inference both from her evidence is that she did. And, as she is shewn one document, it is quite clear that the is exhibit 17. That document is dated between the plaintiff Sarah Bowman, Silver, of the second part. It recites the mortgage to the loan company and had, by an agreement of even date, agreement for the payment of the loan company consideration of an extension of time granted and that the party of the first part to Silver the Chambers lease and the as security collateral to his said mortgage his said liability. And the document assignment accordingly of the lease be

There is substantial agreement between as to the main terms of the alleged trust at the time some document was executed and, as no other document than the one was ever executed by her, that must be also established that its execution was as far as terms were concerned, because conveyance to Silver from the loan company obtained by him upon the understanding

The document itself, exhibit 17, does not support the alleged trust, but it clearly con

men anxious to protect himself and his security to help the Bowmans further than as an attorney might help them both. It is not such a course as would reasonably have followed upon an arrangement such as that deposed to; and there are other facts which shew that at that time no completed mortgage of any kind had been made, that document having been formed only one step towards an arrangement which afterwards fell through. The property covered by the loan company's mortgage is said by Mr. Massie, the commissioner, to have been a somewhat doubtful security for the amount of the first mortgage. The cost of the property in "brick and mortar and land valuation," as it was then valued, was about \$14,000 to \$15,000, but livery stables were run down, the company were pressing for payment, and were evidently very anxious to get as additional security a mortgage covenant of Silver. And the arrangement which was made, the preparation and execution of exhibit 17 was to that effect, Silver having apparently at one time agreed to give such a covenant. But in the end he refused to do so in the month of April, 1896, an action was brought against him by the loan company after a long delay, on the assumption that he had gone so far as to become bound personally. He defended, and was not pressed. The company continued to press.

The property was offered for sale by auction, but was not sold for want of buyers. Then Silver offered to buy, and his offer was accepted, although that sum was not less than the amount due upon the first mortgage, and the conveyance before mentioned followed.

Silver is apparently a man of some means, and by reason of that was able to obtain a loan from the company for the amount of the purchase money at a reduced rate of interest. And two years later he obtained a greater reduction by receiving a further mortgage on other property of the loan company by the loan company to Silver in the month of June, 1896. In the previous month of March, 1896, a solicitor acting for Bowman, prepared an agreement between Bowman and Silver, which recites the terms of the loan company and to Silver, that Bowman had advanced the equity of redemption, that Silver is in receipt of the interest and profits (of which there is otherwise no evidence) and the loan company have advertised the lands for

sale under the power of sale contained in that Silver has agreed that if he should he will hold the same in trust for Mrs. document provided that if Silver purchased the lands in trust for Mrs. Bowman, and thereafter, upon payment to him of the amount he had paid for the lands and the amount with interest on all such sums at 6 per cent on the lands to Mrs. Bowman. Mr. Wallace says (he was examined abroad under commission) that the document was prepared under instructions given to Silver jointly, who were both present; and that he sent a letter with the agreement, and sent it to the market, where Silver then resided, and that it was not executed or returned, but it appears that the document was found, unexecuted, in the office of his solicitor. Wallace further says that he does not know if it was executed. Bowman always expected Silver to carry it out. Bowman was himself willing to carry it out. Bowman says that Silver wanted to "beat" him, when the agreement back signed. Silver always wanted to help Bowman; but the "always" is confined to the "once," for he states elsewhere that he had only the one interview that at which Silver was present when the

Several conclusions seem to be justified by this evidence by Mr. Wallace. First, Bowman had a solicitor and was acting through him that the unsigned document prepared by him presses a totally different trust from that which had been agreed to in the previous month of Bowman and his wife; and third, he did not get back the document signed by Silver, instead of acting for and helping him to "beat" him, which expression can only mean that if Silver did purchase, as his position as a gagee might compel him to do for him, he would do so for himself, and not for the trust thus put upon his guard against Silver. For nearly 3 months he apparently left them as they were. He did not write or get his solicitor to insist on getting the document back e

any, did nothing. And, although he knew of the sale never at once, he even then made no further written and, either by himself or through his solicitor, for the execution of the document or for the performance of the trusts, while Silver lived, a period of over 7 years, during which, so far as appears, Silver was in possession of the lands, and exercising the usual rights of an owner. It is true that Bowman says he demanded a settlement from Silver from time to time, but all his demands were verbal, and there is no evidence of them but his own. And his evidence is, for many reasons, unsatisfactory, and was apparently so regarded by the Judge at the trial. One instance has been given, namely, the contradiction between what Bowman put in writing by Mr. Wallace as the trust and what was agreed to by the Bowmans as the trust actually agreed upon. In this connection, and as shewing further how little credit can safely be placed upon Bowman's evidence, I may mention that in his examination in chief he made no mention of the interview in the office of Mr. Wallace or of the execution of the unsigned document before mentioned. In his cross-examination he does refer to the two interviews at his office with Silver, the first concerning the chattels, and the second an earlier document intended to settle the accounts between them (but also unsigned) was prepared, but he did not even then speak of the document prepared in March, 1861. And the case was closed without that document having been put in evidence. Then, after the case had been closed, Mr. Watson, for the plaintiff, moved for leave to give further evidence, and Mr. Wallace was examined and the defendant proved, and Mr. Levesconte, the plaintiffs' solicitor, was also called and said that he had received some information of such a document from Bowman before the trial, that he had searched for it, and, failing to find it, had concluded that Bowman was mistaken. He then explained how in the trial he searched for and found it in Mr. Millar's office, and only after the evidence at the trial had been closed, he said that he had not conveyed to counsel for the plaintiff the suggestion received from Bowman that there had been such a document. Then Bowman was called and was examined by his own counsel to explain why he had not mentioned the facts in connection with the document either in his examination in chief or in his cross-examination, and his evidence was that he did mention it to his solicitor, who seemed

to pay no attention to it, so he did not sign it. Then Mr. Watson (counsel for plaintiffs) got from him a much-needed explanation of the difference between the trust as set forth in the verbal trust formerly sworn to, and the trust in the document had been prepared before the arrangement had been made, which satisfied him because it did not give Silver enough to sign it. It was clearly as reasonably can be, that the trust whereby Silver was to get one-half of a share if it ever was made, at the time when Mr. Watson saw the document before referred to as existing before the preparation of the unsigned document in conjunction with all the other circumstances of the question to place any dependence upon the evidence, and Mrs. Bowman's must share the property very much for the same reasons.

No doubt, the Bowmans were anxious to get away from Silver. He had apparently befriended them, but he had evidently grown tired. The property was extremely small, if any, and the case was entirely concluded, with at least a shew of justice to himself by purchasing, and that he did so without any kind of understanding on the part of the plaintiffs, or either of them, is the only explanation with the proved conduct of both parties leading to the sale to him onwards to his death.

This renders it unnecessary, in my opinion, to rely on the alleged corroboration upon which the case was relied, all of it of the most general and unimportant kind involving simply what no one disputes. The time was befriending the Bowmans; or, at least, the Statute of Frauds and the cases upon which the case was referred.

The appeal should be allowed and the action dismissed, all with costs.

MEREDITH, J.A., gave reasons in support of the conclusion.

MOSS, C.J.O., OSLER and MACLAREN

NOVEMBER 15TH, 1907.

C. A.

ELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED

Iracy—Trade Competition—Procuring Incorporation Company to Compete with Plaintiffs—Inducing Plaintiffs' Servants to Leave Employment—Using Information obtained in Plaintiffs' Employment—Appropriation of Plaintiffs' Documents and Chattels—Master and Servant Breach of Confidence—Injunction—Damages—Appeal Costs—Evidence

Appeal by defendants and cross-appeal by plaintiffs from decision of CLUTE, J., 8 O. W. R. 888.

The appeal and cross-appeal were heard by MOSS, C.J.O., G. GARROW, MACLAREN, and MEREDITH, JJ.A.

F. Shepley, K.C., and W. H. Irving, for defendants.

E. E. Raney and A. Mills, for plaintiffs.

MOSS, C.J.O.:— . . . The gist of the action . . . is that the individual defendants were for a long time before June, 1905, in the employ of the plaintiffs under contract to serve them in various capacities, for terms extending in the case of defendant King to 31st January, 1906, in the case of defendant Baird to 1st December, 1907, in the case of defendants Harcourt and Trout to 31st January, 1908, in the case of defendant Archibald to 31st August, 1908, and in the case of defendant Hoose from week to week, and that while in such employment they maliciously conspired and conspired together to effect the following purposes: (1) to procure the incorporation of a company to do business in competition with the plaintiffs; (2) to induce other servants of the plaintiffs to break their contracts of service with the plaintiffs and associate themselves with the defendants; (3) to communicate to such servants and other persons private and confidential information with respect to plaintiffs' business, the knowledge of which was acquired by these defendants while in plaintiffs' employ;

(4) to print and publish false and malicious statements in relation to plaintiffs' business; (5) to appropriate to the defendants' office and to appropriate to the use of the defendants the valuable records, documents, and property of plaintiffs; (6) to abstract from the shop and appropriate to defendants' use the tools which had theretofore been or were used in the manufacture of machines or apparatus in the manufacture of plaintiffs' products; (7) to use the tools to duplicate the plaintiffs' machines; (8) to make use of private and confidential information required by defendants Baird and Hoose in their employment to duplicate plaintiffs' specifications; (9) to make use of private and confidential information acquired by defendants King, Harcourt, and others in plaintiffs' employment to make for defendants a list of plaintiffs' customers in Toronto; and (10) to use the means to deprive the plaintiffs and get for themselves the business which the plaintiffs and their agents had built up. . . . The conspiracy to injure plaintiffs' business, and the acts done in alleged pursuance of the conspiracy, are the gravamen of the action.

The learned Judge has found all the counts to be true and has awarded an injunction and an account of profits of a very far-reaching character, and has found that the defendants are liable to pay the damages sustained, together with all the costs of the action (except slight exceptions) down to and inclusive of the date of judgment.

Included in the relief thus granted to the plaintiffs against the defendants, there is one matter which is not in dispute between the defendant Hoose. He claims to be the owner of 88 tools, 88 in number, which he took away from the plaintiffs' employment. The judge found that the tools to be plaintiffs' property, and that the defendant Hoose, which was given . . . as a term of the judgment, to the plaintiffs pending the action, be cancelled. . . . He is not and never was in the defendants' company, and has not been in it or the business carried on by the other defendants. The salary which he receives for his services in the matter in which he is interested is the only consideration. Yet he has been joined with the other defendants in the charges of conspiracy and wrongdoing lawfully made against them.

by the judgment he has been involved in all the consequences to the same extent as the other defendants. The Judge finds that he did not take any active part in the stages of the conspiracy, but that he left the plaintiffs' pay at the other defendants' solicitation and assisted them in their undertaking by carrying away plaintiffs' tools and them in furtherance of defendants' business.

Now, so far, assuming that these findings are supported by the evidence, they do not appear to furnish any sufficient reason for joining him as a party to the alleged conspiracy and rendering him liable for the consequences of the other acts charged against his co-defendants. . . .

There is literally no evidence to shew that Hoose was at any time found in conference with his co-defendants with a view to their project, that he was even consulted or gave advice upon it, or that he was even offered, much less received, any share in or financial benefit from the business. He has not shewn the prospectus or any of the correspondence.

He had no hand or part in its publication or in the attempts to procure other of the plaintiffs' employees to leave their service, or in the abstraction of records, documents, drawings, or in their use in defendants' business, or in the compilation of lists of customers. . . . It is not even alleged that he made use of any of the tools in question while working for defendants. Much time was spent at the trial in the effort on the part of the plaintiffs to shew that the tools were in use in defendants' factory, but in the outcome it was a failure to establish it. It is to be borne in mind that it lay upon plaintiffs to establish the fact, which was apparently considered very material. Here the testimony was that of defendants called as witnesses by plaintiffs, and they denied the user. Plaintiffs are, therefore, driven to the position that, notwithstanding the denials, the Court may believe the testimony, and assume the affirmative to be proved. But, as pointed out by James, L.J., in *Nobels Explosive Co. v. Jones*, 17 Ch. D. 722, at p. 739, it is a fallacy to suppose that the affirmative is proved because the witness has proved the negative is not wholly and entirely to be believed.

See the same case, 8 App. Cas. 5 . . . *Louis v. Brown*, 73 L. T. at p. 228. . . .

The plaintiffs suffered no appreciable damage from the fact of Hoose leaving their employ, and it would be the question to hold him responsible on that account.

for all the other damages the plaintiffs. With regard to the 88 tools, there seems to be no doubt that they were made a mountain out of a molehill. . . . estimates of their value. . . . Probable value is a fair if not a high value. . . . A verdict of the long and expensive trial of this action for 10 days, was devoted to the issue as to the value of the tools. The issue has been determined in favor of the plaintiffs but that conclusion cannot be supported. . . . The onus was on plaintiffs to show that the tools were in the tools. . . . It was shewn that the plaintiffs' shop was to stamp and number the tools. . . . to them. At the time the 88 were taken to the shop they were stamped. Upon an interlocutory application the plaintiffs early in the action . . . they were ordered to produce the plaintiffs. In the course of the trial it was shewn that the plaintiffs had stamped them as soon as they were made, but had not used them in the whole time they were in their custody. The plaintiffs contended that tools made during the trial, no matter under what circumstances, were the property. But the preponderance of testimony was that every tool-maker's kit is made up of tools, some of these were, in the shops, at the time the tools were made. The material purchased or procured by the plaintiffs. There are times in the course of a tool-maker's life when the machine of which he is in charge is doing some piece of work which calls for his attention. During such periods the tool-maker may if he choose to sit with folded hands and do nothing. He has no cause of complaint. Is there any reason why he should not employ that time on a piece of work if he is so disposed? And if he does so, is there any reason why the employer to demand the benefit of his time in the absence of a covenant expressly to the contrary? The plaintiff's spare time is his own, and he is his master for benefits derived from it. The plaintiff was under no covenant other than that of his engagement, and if there were times when he was to utilize his time for the benefit and advantage of the plaintiffs, he might properly make other use of his time.

[Reference to *Jones v. Linde* British O. L. R. 428; *Sheppard Publishing Co. v. Jones* 504, 5 O. W. R. 482.]

the utmost complaint that plaintiffs could make would be that the use of their power was improper. But that use was not to convert the tools so made into property belonging to plaintiffs.

The result, so far as the defendant Hoose is concerned, is that the appeal should be allowed as to him, and that it should be declared that he is entitled to a return of the tools, and that the action be dismissed as against him with costs as well below as of the appeal.

As to the case against the other defendants. There is no doubt that the conduct of the defendants in regard to their doings and dealings in respect of which complaint is made, was reprehensible and wrong.

It is self-apparent that persons of more refined temperaments, and more generous regard for the company in whose service they had been so long engaged, would have refrained from many of the methods and from the language of which the defendants made use in their endeavours to obtain subscribers to their share list, and to get persons in the plain-employment to join them or enter their service. In many instances these efforts proved unavailing, and the defendants lost their mark, and the plaintiffs lost nothing by them. The animus thus created has tinctured the whole proceedings in the action.

On the other hand, it has been sought to attribute to these things an importance out of all proportion to their consequence.

There was nothing legally or morally wrong in the defendants deciding to embark in business for themselves and form a company for the purpose. Nor did the fact that this business was to be of the same character as the plaintiffs—a rival business in fact—prevent them from so doing. Competition is itself no ground of action, whatever damage it may cause, and there was no contract or covenant between the plaintiffs and the defendants, or any of them, which enables the plaintiffs to say that the defendants could not, after leaving their employ, engage in a similar kind of business. And it is almost needless to say that the joining together or combining or “conspiring,” as the plaintiffs term it, of the defendants to do these acts, does not render them any more culpable than would the doing of them by one.

1.

[Reference to judgments of Bowes and Crompton v. Mogul S. S. Co. v. McGregor, 23 Q. B. 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000]

It is clear upon the evidence that the design of the defendants was to establish a business which they expected or hoped to obtain, and it is out of the question to say that the destruction of the plaintiffs' business was the object of building up the business, say that with the object of building up the business they resorted to means which were not fair against the plaintiffs, but it is quite another question whether the means were resorted to only for the purpose of destroying the plaintiffs' business. Partial colour is given to the latter argument by some of the defendants' evidence, but after all, as remarked by Lord Macnaghten in the case, [1892] A. C. at p. 50, "the use of the word 'business' in the correspondence cannot affect the meaning of it."

The adoption by the defendants of the word "Business Systems" as their corporate name, and has been accepted by the trial judge, and done in pursuance of the alleged conspiracy to obtain plaintiffs' business. No complaint appears in the voluminous pleadings. Neither in the many claims for relief and in the use by the defendants of their corporate name, the evidence no such claim could be made, and no ground for the contention that the word "Business Systems" ever became so associated with the articles produced by them in the business, specially identified in connection with the business, that not only persons carrying on business, but persons engaged in other kinds of business, the habit of using the phrase as in the business classes of their business.

The plaintiffs, so far as appears, did not apply to the Governor in council or take advantage of the Companies Act to impeach the right of the defendants to incorporate under the name adopted by them, the apparent reason for saying that their incorporation was in any way unlawful.

Much was also attempted to be made of the fact that the defendants "ticked off" in a telephone

plaintiffs' Toronto customers, and the plaintiffs have appealed in respect of it. It appears that the book did not belong to plaintiffs, if that would have made difference, and what appears to have been done was to enter it and pick out the names and addresses of business who were likely to use the loose leaf system of book-keeping, not necessarily the plaintiffs' customers, but others all. For the same purpose they ordered and obtained from the Might Directory Company a list of the business firms, including of course the plaintiffs' customers in toto, but the plaintiffs say they make no complaint of

It is not easy to see what distinction is to be drawn between the cases. The defendants' object in both cases was to obtain information as to the persons in trade with whom it would be desirable to deal for the supply of the articles they were intending to produce and sell. The fact that in one case they used their own means and were assisted by their own knowledge and in the other employed third persons to obtain the information can make no substantial difference. . . .

Robb v. Green, [1895] 2 Q. B. 315, distinguished. *v. Evans*, [1893] 1 Ch. 218, and *Louis v. Smellie*, 73 228, referred to.]

The trial Judge points out that the plaintiffs are not making any claim for damages by reason of this particular act on the part of the defendants, and he refused an injunction in respect of it. A great deal of time was devoted to the trial and on the argument of the appeal, the plaintiffs by way of cross-appeal again contending that they were entitled to the injunction; but, for the reasons stated, the learned Judge's conclusion should be affirmed.

The remaining charges against the defendants (apart from the general one of conspiracy) are more substantial in nature, but it remains to consider the nature and extent of the relief to which the plaintiffs are entitled. It is obvious from what has been said that a considerable part of the present judgment cannot stand. . . .

The judgment will be:—

- (1) To set aside the judgment at the trial.
- (2) To declare that the 88 tools are the property of the defendant Hoose, and to order their delivery to him, and to dismiss the action as against him with costs.

(3) To direct an inquiry as to the cost sustained by the plaintiffs by reason of their loss of business, other than Hoose having communicated to persons the amount or rate of profit or cost of production or manufacture of any commodities manufactured by the plaintiffs or defendants other than Hoose, or any of the plaintiffs' employment, and also by reason of the defendants in carrying on their business, and records of sizes of blank sheets to the plaintiffs' factory; the costs of the reference to the Master.

(4) The payment by the defendants of such damages when ascertained as aforesaid.

(5) To direct payment by defendants of the general costs of the action, and payment to defendants of the costs occasioned by the failure of which the plaintiffs fail.

(7) To direct payment by plaintiffs of the general costs of the appeal and payment to plaintiffs of the costs of such parts of the appeal as may be ordered in.

In view of the nature of the inquiry directed in order to facilitate the termination of the action, the plaintiffs are willing to forego the inquiry and accept a sum to be now fixed, the sum of \$4,000 direct payment to the plaintiffs of \$4,000 damages, and the inquiry directed will be terminated.

MEREDITH, J.A., gave reasons in view of the above conclusion.

OSLER, GARROW, and MACLAREN, J.

No

C.A.

PENSE v. NORTHERN LIFE ASSURANCE CO.

Life Insurance—Action on Policies—Quantum of Damages in Force at Death of Insured—Quantum of Damages—Payment of Premiums—Annual Premium.

Appeal by defendants from judgment of the Master. O. W. R. 646, in favour of plaintiff in

defendants \$2,000, the amount of two insurance policies issued by them upon the life of George Ziegler junior, and assigned to plaintiff. The defence was that the policies lapsed by reason of non-payment of the premiums, but BEE, J., upon his construction of the peculiar wording of the policies, held that they were in force at the time of death of the insured, on 8th November, 1906, and gave judgment for \$2,000, less the current year's premium on second policy, with interest from teste of writ and costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, CLAREN, and MEREDITH, JJ.A.

T. H. Purdom, K.C., for defendants.

A. B. Cunningham, Kingston, for plaintiff.

MEREDITH, J.A.:—There is no just reason for applying different rule of construction to a contract of insurance than that of a contract of any other kind; and there can be no excuse for casting a doubt as to the meaning of a contract with a view to solving it against the insurer, however much the claim against him may play upon the words of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof—if I may use such a term in reference to the interpretation of a writing—is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none are exempt, and so, doubtless, all more or less affected by the natural bias arising from **such a position**; and so ought to be careful lest that bias be not counteracted by a full apprehension of its existence.

Dealing with this case with all these things in mind, we have found no difficulty in reaching the conclusion that the action ought to have failed at the trial as to each of the policies.

In regard to the first, 5 yearly premiums were paid, but the 6th was not paid. The day for payment, if the insured was to renew the policy, was 20th May, 1906: the insured died on 8th November, 1906, without having paid, or, so far as the evidence shews, having had any intention or desire

to pay, it; and without having made any demand, or claim to the insurers in respect of it; but, on 9th June, 1906, he assigned it to the assignee, on application, demand, or claim, nor any payment by the assignee to the defendants until the death of the insured; but notice of the assignment was given to the defendants immediately after it was made.

One of the conditions of this policy was that the payment of a premium for one month should cease to be in force. Under this condition the policy came to an end in June, 1906. But under the conditions certain rights remained in the insured. The conditions are in these words:—

1. That if, after the payment of 3 fu this policy shall lapse for the non-payment of a note, cheque, or other obligation given for premium, the company will, upon application, pay of all indebtedness hereon, and the surrender of the last renewal premium receipt, after such lapse, issue a non-participating policy with the same provisions as this policy, for the same parts of the principal amounts as completed. If no sum shall have been paid in cash hereon, or towards the purchase of extended insurance, the company will, upon application, pay with the schedule indorsed hereon.

2. That if, after the payment of 5 fu this policy shall lapse for any of the reasons mentioned in the company will, upon application, the payment of the indebtedness hereon, and the surrender of the last renewal premium receipt, within 3 months after such lapse, pay to the holder of this policy the value shewn in the schedule hereon indorsed. If no sum shall have been paid to him any sum not exceeding the sum shewn in the schedule for one year, interest to be paid at the rate of 6 per cent. per annum, the premium for the next year, and the said interest, being first deducted.

But the insured did not, nor did his estate, attempt to make any election under either of the above conditions, or take any steps whatever to obtain any advantage thereunder, they seem rather to have abandoned the policy.

It will be observed, in the first place, that the condition is based upon the fact that the

reason of non-payment of the premium, and then provides for the acquisition of new rights, notwithstanding such lapse; and the conditions upon which such new rights may be acquired seem to me to be plainly stated; there must be application for such of them as the applicant elects to take, there must be payment of all arrears, and a surrender of the policy and of the last renewal receipt, all within three months after the lapse of the policy. None of these things was done within that time, or at all, and so neither the insured nor his assignee ever became entitled to any such new right, but the policy remained a lapsed one, if it indeed not also an abandoned one. But it is contended, and it has been held, that that is not so, that the provisions as to application, payment of arrears, etc., apply only to the first of the two new rights provided for in each of these conditions, and that each is, therefore, to be read as if there were inserted in it, immediately before the provision as to the secondly mentioned right, and after the word "or," the words "without any such application, payment, or surrender, the company will," or words to the same effect. By inserting apt words the Court can, of course, give the plaintiff almost any sort of relief that may be desired, but this is the contract which the parties actually made, not a new one constructed by any Court, which ought to be enforced. By what possible fair reading of these conditions can it be considered that the application, the payment, and the surrender, all within the 3 months, do not apply to the new right which may be acquired notwithstanding the lapse of the policy, just as much as the other? If a defendant had promised, upon application, payment of an indebtedness, and surrender of the contract, within 3 months, to deliver to a plaintiff a white or a black horse, could it be contended that the application, payment, and surrender within 3 months applied only to the white horse, and the plaintiff was entitled to the black horse, which the defendant must deliver because of the plaintiff's default in all the things? The literal meaning of the words in question, as well as all things else, save our sympathies, are against the ruling of the trial Judge. Why should not application, payment, and surrender, within the limited time, be made for one right just as much as the other? It was said by the trial Judge that, as to the second in their order of statement, no new policy would be necessary; but, if that were so,

how could it materially affect the qu
absolve from payment of arrears or do a
cation or time limit in the one case any m
However, it is not so; a new policy woul
old policy, requiring payment of premi
for lapse in default of payment, would b
cable. Again, in the second, in their c
tions, the second right is to a loan of m
hardly be effected without an application
defendants. And again, why is the seco
first condition the one which the insur
asked and unconditionally; why not the
second condition, which condition mor
case, for 5, not merely 3, premiums had

It is surely unnecessary to pursue
The meaning of a provision which the p
set up, and upon which alone he can rel
action, instead of being plainly in his
opinion, plainly against him. The onu
been satisfied. The policy ceased to exi
the non-payment in May, 1906; and m
acquired under the conditions which I h
necessary to consider whether both, or
these two conditions, apply to a policy u
iums have been paid; but it may be help
the schedule referred to in these conditio
cable only to lapsed policies, but is ap
force as well, and those policy-holders
are not to be put on more favourable te
those who are not.

As to the other policy the case seems
equally clear.

Under it the first premium was to
on delivery of the policy, and the su
were to be paid annually, the first of th
1904—that is, in advance. Three premi
in 1903, when the policy was made, anoth
third in 1905; no payment was made in
was assigned to plaintiff on 8th June, 19
died, as was before stated, on 8th Nov
policy contained a provision that it sho
force,” if any premium remained unpa
month after it became payable. The sole

premiums were payable in advance, for, if so, it is in-
 table, and it is not disputed, that the policy has ceased
 exist long before the insured's death. It is difficult for
 to understand upon what possible ground it can be con-
 sidered that the premiums were not payable in advance.
 else could they be payable under the ordinary con-
 tract of life insurance? The contract is unilateral in this
 respect, that the insured is not bound to continue the insur-
 ance, but the insurer is, so long as the premiums are paid.
 The insurer to carry the risk for the year, and then, ac-
 cording as it may suit the insured, be paid or not paid for
 carrying it? The very nature of the transaction
 necessitates payment or some obligation to pay in advance.
 In this case the contention is that the risk was carried al-
 though there was no payment nor any sort of obligation to

But thus, without any consideration, the contract
 would be nudum pactum, unless, under seal, the defendants
 had covenanted to so carry the risk. The policy, however,
 instead of containing any such extraordinary covenant, clear-
 ly provides for payment in advance: a payment when it was
 first brought into force by delivery; a payment a year after
 and payments annually thereafter. "Annually" surely
 means each year, and yet it has been held that it means
 once a year after skipping a year. Again, is it necessary, is
 it excusable, to pursue so plain a matter further?
 I would allow the appeal, and dismiss the action.

OSLER and MACLAREN, JJ.A., concurred, for reasons
 stated in writing.

ROSS, C.J.O., and GARROW, J.A., also concurred.

NOVEMBER 15TH, 1907.

C.A.

JARVIS v. JARVIS.

*Band and Wife—Land Purchased by Husband—Con-
 veyance Taken in Name of Wife—Gift or Settlement—
 Intention—Evidence—Improvidence—Absence of Rela-
 tion of Confidence—Undue Influence—Want of Inde-
 pendent Advice—Reformation of Conveyance—Intention
 of Settlor—Life Estate.*

Appeal by plaintiff from order of a Divisional Court (S.
 R. 902) allowing an appeal by defendant from judg-
 ment of MAGEE, J., at the trial, and dismissing the action.

The appeal was heard by Moss, C.J. MACLAREN, and MEREDITH, JJ.A.

A. H. Marsh, K.C., for plaintiff.

H. H. Strathy, K.C., for defendant.

Moss, C.J.O.:—This action is between the former claiming to have set aside a parcel of land in Orillia, made by one Sarah, the plaintiff had purchased, and whom the defendant. The conveyance as executed by the defendant in fee. In the statement of the plaintiff it was alleged that the conveyance was so made without the knowledge or consent, and he claimed that the plaintiff had excelled, or that the defendant should be compensated for him. The defendant asserted that the plaintiff had agreed to give her the land, and that the conveyance was made by his direction, and she insisted that the conveyance was absolutely. During the trial before Mr. Justice MacLaren given to the plaintiff to amend by adding a further ground on his part as an additional ground of recovery.

The trial Judge reached the conclusion that the plaintiff had not intended to make an absolute conveyance to the defendant, and that the conveyance was made to his desires, and that when he executed the conveyance he intended to stand its nature and effect, and he gave the plaintiff the lands in the plaintiff in fee. The defendant appealed to a Divisional Court, where it was held that the conveyance was in pursuance of plaintiff's directions, and was made in accordance with his directions, and was dismissed. The plaintiff in his turn appealed to this Court. After the argument the plaintiff, acting by counsel, of the Court, submitted a further amendment of claim, to the effect that the true intention of the defendant was to have an estate for life in the event of her surviving the plaintiff, and that, in the event, to, the lands were to be vested in the plaintiff, praying that it be so declared. The defendant in opposition that the amendment should be refused, on proper terms as to costs, and that the conveyance is not to be upheld in the whole, but by the evidence should be declared. The Court held in one for allowing the amendment.

should the conveyance be upheld, and, if not, to what should it be set aside or varied?

Although the trial Judge adjudged that the plaintiff was to have the lands vested in him, thereby in effect vesting the conveyance in so far as it vested any benefit in the defendant, he expressed the opinion that in view of the evidence the plaintiff intended that the defendant should have an estate for life in the lands in the event of her surviving him. And in not awarding her such an estate or interest he, no doubt, acted upon the doctrine that where a voluntary settlement is intended to be made according to the settlor's declared wishes, and the conveyance is drawn and executed, fails to properly express the settlor's intentions and wishes. It cannot be reformed, but is wholly set aside. And, no doubt, the general rule is stated by Lord Hatherley in *Turner v. Collins*, L. R. 7 p. 342: "It has always been said and truly that there is great difficulty in reforming a voluntary deed, because, if a part of it is shewn to be contrary to the intention of the parties, you can only deal with it by setting the whole aside as in *Hoghton v. Hoghton*." But, as the case before Lord Hatherley shews, there are exceptions to the general rule. While in a case in which the voluntary settlor's desires have not been properly or effectively carried out, he cannot be prevented from changing his intentions, and cannot be compelled to adhere to what he had previously intended, there is nothing to prevent the Court from giving effect to the parts of the instrument as he may be willing to let

In the present case I think that it appears from the evidence not only that it was not the plaintiff's intention that the lands should be conveyed absolutely to the defendant, but that the plaintiff did not understand, and no proper explanation was made to explain, the nature and effect of the conveyance. It is not necessary to decide upon whom lay the blame, or whether the relationship of the parties, coupled with the plaintiff's age, inability to read or write, ignorance of legal notions of the kind, and complete separation from disinterested friends or advisers, cast upon the defendant the burden of making sure that the matter was fully explained, and that he understood its nature and effect. It now appears that owing to the want of any such precautions and to the failure of the carrying into effect of the plaintiff's desires was

intrusted to persons wholly inexperienced and almost utter strangers to the plaintiff does not express his intention. Alluding to what has been deposed to as having been the intention of the plaintiff and the other parties present when Sanderson put down something which has been mislaid and cannot be proved, the court held that the conveyance was executed by the plaintiff in the absence of any short of proof that the plaintiff intended that the land should be conveyed to the defendant. The fact that he made his mark to the plaintiff is a tangible piece of evidence in that circumstances disclosed in the evidence. The court held to the strict consequences of that fact.

That he did not intend to deprive the plaintiff of the land is apparent, and so the conveyance is void. It does not express his mind. But, upon the evidence as they now appear before us, it is proved that the defendant has the interest which the trial judge found that the plaintiff contemplated she should have for life. The evidence amply sustains that in this respect.

Therefore, instead of vesting the land in the plaintiff, it should be declared that the defendant is entitled to an estate therein for the term of years, and in the event of her surviving the plaintiff, the lands are vested in the plaintiff for life.

The case is not one for costs to or against the plaintiff.

OSLER, GARROW, and MACLAREN, J.

MEREDITH, J.A., for reasons stated in his opinion that the defendant should be declared entitled to the lands in question for the plaintiff's natural life, and as to the remainder to the plaintiff's heirs and assigns forever.

J.

NOVEMBER 16TH, 1907.

WEEKLY COURT.

MACLAREN v. MacLAREN.

Insurance—Preferred Beneficiaries — Designation by Identification of Policy—One of Four in Same s—Insurance Act—Bequest of "Policy" Held not include More than One—Evidence—Admissibility—Application for Insurance—Letter of Insured.

on by the plaintiffs, the executors of the will of the MacLaren, for judgment on further directions, to leave reserved by BRITTON, J., in a judgment rendered in November, 1903.

Orde, Ottawa, for the plaintiffs.

Cameron, for the infant defendants.

BRITTON, J.:—The late John MacLaren, of Brockville, British Columbia on 20th May, 1903, as the result of sustained in an accident 2 or 3 days before. He left valued at \$830,000, against which there were liabilities of \$35,000.

He will made two days before his death, he bequeathed estate to his wife, subject to payment of his debts and of \$50,000 each to his four children.

His will also contained the following provision: "I also to each of the above named children one-quarter of the proceeds from a 5 per cent. gold bond policy issued by the Farmers of Hartford, Conn."

The testator had 4 such policies in the Travellers Insurance Company of Hartford, each for \$25,000. These policies were of the same date and were identical in their terms. The case was presented for the opinion of the Court upon this point:—

Whether the children are entitled under this bequest to the four policies or to one of them only.

If the children are entitled to one policy only, the proceeds are to be divided equally amongst them, whether they are entitled to the proceeds of such policy as preferred beneficiaries under the Ontario Insurance Act.

Upon the argument Mr. Came upon the first question, the application of a letter of the late John MacLaren, which he says: "I beg to acknowledge a policy for \$100,000 on a 5 per cent issued by the Travellers Insurance Conn. I have much pleasure in stating it is satisfactory in every respect." And Mr. McCaw, the insurance agent who took the application, in which he says that Mr. MacLaren had a policy of \$100,000, and that it was on Mr. McCaw's suggestion, for convenience that Mr. MacLaren always considered himself insured for \$100,000.

I think the application for the insurance policy made part of the insurance contract which is attached to each policy, in the evidence.

The application shews that the insured was "a \$100,000 in 4 policies of \$25,000 each" kind of policy desired as "principally for a year endowment, \$2,500 a year for each policy and the annual premium is stated to be \$1,000." In the kind of policy and stating that the transaction is apparently treated as a single transaction for a \$100,000 policy.

Even if the letter of the deceased Mr. McCaw be admissible (I think it is) I find in them anything which would entitle the testator, who must have known he was insured for \$25,000, meant, when he bequeathed the whole 4 policies. Speculation in contracts and contrary to rule: *Re Sherlock*, 28

The cases are numerous in which a bequest of articles of property of the same kind as the whole of them. For instance, a testator bequeaths to the legatee "a horse." It is in form that such a bequest is not void, but entitles the legatee to only one article which he may select out of the property. In these it is sufficient to refer to the case of *O'Donnell v. Welsh*, [1903] 1 Ir.

, 12 Ch. D. 683. Other cases may be found in Jar-
Wills, 5th ed., p. 331.

ards v. Patteson, 15 Sim. 501—not cited at Bar—
em at first blush to support the contention that the
of “the proceeds of a 5 per cent. gold bond policy
ravellers of Hartford, Conn.” may be read as a be-
the proceeds of all of the testator’s insurance of that
on. There the bequest of “all my property in the
and Russian funds,” and “also that vested in a
mortgage security,” was held, as to the latter words,
ivalent to a bequest of “all my property vested in
mortgage security.” The preceding words appar-
tified the Court that the testator’s clear intention
bequest was to deal with all his property invested in
mortgages, of which he had several, precisely as he
t with all his property invested in the Austrian and
funds, and that the little word “a” had slipped in
erterence. In the present case there are no words in
ition to aid the contention that by “a policy, etc., in
ravellers,” the testator meant all his insurance of that
on. Because of the absence of any such context as
in Richards v. Patteson, the bequest construed in
is clearly distinguishable from that now under con-
n. I have found no other decision which lends any
to the argument advanced by counsel for the infant
the testator.

, in my opinion, impossible to read the bequest in
, which is absolutely free from doubt or ambiguity
ce, and which is not rendered doubtful or ambiguous
roven fact that the deceased had four policies, other-
n as it is expressed, that is, as the gift of a single

a the second question the case is, I think, if anything
The statute (R. S. O. 1897 ch. 203, sec. 159), has
d by authority binding upon me to permit the de-
a by will of preferred beneficiaries, either originally
ay of substitution. The designation, however, where
will or by any instrument in writing other than an
ent on the policy, must “identify the contract by
or otherwise.” That this statute was passed to
enefits to wives and children, and should receive such
tion as will tend to effectuate that purpose, may be
. The Courts have gone far to place upon the statute

a liberal construction in favour of the red class. Thus in *Re Cheeseborough*, the testator had 5 policies of insurance, the beneficiaries were designated, a bequest of his insurance policies, was held as if under the statute of the three insurance beneficiaries had not been named. 8 O. L. R. 720, 4 O. W. R. 533. However, if I were to hold that the policies, all answering a particular description as an identification of the policy designated may select under the bequest beyond any decision yet pronounced by the beneficiaries upon the question of the statute.

In my opinion, it is not possible to select a quest of one of 4 policies, any one of which to answer the bequest, is such a designation as requires compliance with the requirement of the statute that the policy be selected by number or otherwise.

An order will issue containing directions with the foregoing expressions of opinion. The parties will be paid out of the estate of the deceased as between solicitor and client.

TEETZEL, J.

WEEKLY COURT REPORTS

DIXON v. GARBUTT

*Contract—Remuneration for Work as
Deceased Person—Promise to Pay
Rate Fixed—Claim against Estate
Evidence—Report Varied in Appeal
Allowed.*

Appeal by plaintiff from report of the County Court of Wentworth, upon the issue as to the amount due to the defendant ascertained by her for the late Isabella Dixon of \$3,055.50.

W. Laidlaw, K.C., for plaintiff.

G. Lynch-Staunton, K.C., and E. J. Lynch, for defendant.

ETZEL, J.:—This action by an administrator arose out of an unsuccessful attempt by the defendant to establish a claim for her by the intestate of upwards of \$20,000; and the defendant counterclaimed to have specific performance of an agreement by the intestate to leave her by will \$5,000 cash and a house and lot, and in the alternative for payment for work and labour performed by the defendant for the intestate from February, 1903, to May, 1906.

At the trial the plaintiff succeeded in having the alleged agreement declared void, and also in defeating the defendant's counterclaim for specific performance; but, the plaintiff having submitted to payment of a reasonable sum for defendant's work and services, a reference was directed to Judge [name] as special referee, to ascertain what, if anything, is due to the defendant in respect of her counterclaim for work and labour performed . . . for the late Isabella Brown (whose estate the plaintiff is administrator) during the period above mentioned; and this motion is by way of an appeal from the report made upon the reference.

The rate of wages was fixed between the parties, but it was established that the intestate agreed that the defendant should be "well paid for her services."

The defendant was employed in all 159 weeks and 3 days. The referee allowed \$25 per week for 66 weeks and 3 days, and \$15 per week for 93 weeks, making the total allowance \$5,550.

The reasons influencing the referee in making the above allowance, he mentions in his memorandum of judgment: "The particularly objectionable and arduous work done by the defendant for the deceased Isabella Brown, in addition to her duties as nurse; the fact that the defendant was the only person with whom the deceased would be content; and in consideration of the defendant's standing in life and family financial circumstances, and the measure of the sacrifices made at the deceased's earnest desire."

The appellant contends that the allowance was unreasonable and exorbitant and not warranted by the evidence.

Beyond proving in a general way the nature of the services and the usual wages for a trained nurse, the defendant has no evidence of the monetary value of the services.

The evidence disclosed that for 20 weeks prior to 1st May 1903, the defendant, besides doing the ordinary housework for the intestate, performed at her request the duties

of nurse during the last illness of a and that those duties involved work kind. After the last mentioned date of the last illness of the intestate, 1905, the services performed by the those of a lady's maid and housekeeper last mentioned date until 5th May, 1911, died, the services performed were similar during the last illness of the intestate.

The defendant is not a professional nurse. The plaintiff offered the evidence of two physicians and experience, in whose opinion the services of a nurse could have been obtained for about \$5 per week would be fair wages for a nurse.

The sole question for determination is whether the services rendered, bearing in mind the fact that the defendant would be well paid for the services, meant to mean, liberally paid.

In short, the defendant's claim is that the services rendered were of a kind which Stroud defines to be a reasonable value for services rendered or work done by a servant fixed by contract; and it is further stated that the defendant and Servant, 6th ed., pp. 158, 159, entered into an agreement to pay, but the amount is not fixed. It is upon a quantum meruit, the amount of the sum as the employer acting bona fide would award in payment for the services.

After careful perusal of all the evidence of the services rendered and the value thereof, and of the fact that the intestate to pay liberally, I am of opinion that the amount awarded is considerably more than the amount which would be payable bona fide under the agreement, and is paid for the services.

The intestate, who was a cousin of the plaintiff, an unmarried woman possessed of large means, and it is apparent from the evidence of the defendant that the defendant and her family were very attentive to the intestate, and that the defendant sacrificed the comforts of her own home to attend to the intestate, and that she entertained from the intestate the best that the intestate would out of her abundance, and that she was fully with her by her will.

While the relationship of the parties, the great kindness of the defendant to the intestate, and the personal sacrifices made in serving her, in addition to the services performed, would probably have furnished good ground for granting a settlement at a sum as large as the amount demanded, I cannot, in the absence of agreement, judicially estimate the value of the defendant's services any sum as compensation for personal sacrifices or disappointed hopes, even if I were able to find, as the referee suggests, that the defendant was the only person with whom the deceased would have been content; but, with very great respect, I do not think the evidence warrants any such conclusion.

I award the defendant the following sums, which are, in my mind, very liberal compensation for the services rendered, to-wit: for the 20 weeks from 10th February, 1903, to 1st February, 1903, at \$20 per week, \$400; for the 19 weeks and 3 days from 20th December, 1905, to 6th May, 1906, at \$20 per week, \$390; for all the balance of the period, 120 weeks, at \$15 per week, \$1,800: total \$1,990.

The report will be amended accordingly. Costs of the action to be costs in the cause.

MAHON, J.

NOVEMBER 16TH, 1907.

TRIAL.

KILGOUR v. TOWN OF PORT ARTHUR.

Letters Patent Demising Crown Land—Derogation from Previous Grant—Description—Bed of River—Cancellation of Crown Lease.

Application for cancellation of a Crown patent for land and for other relief.

Hamilton Cassels, K.C., for plaintiff.

A. Moss, for defendants.

MACMAHON, J.:—On 10th March, 1870, the Crown granted to George D. Ferrier all that parcel or tract of land

situated, lying, and being in the district of Algoma (now in the district of Thunder Bay), in the province of Ontario, containing by admeasurement $267\frac{1}{4}$ acres, be the same more or less, which said parcel or tract of land may be otherwise known as follows, that is to say, being composed of mineral location "S" in the township of McIntyre, as shewn on a plan of survey by provincial land surveyor Hugh P. Savigny, dated May, 1868, and marked "George D. Ferrier," of record in the department of Crown lands, and the metes and bounds of which are described as follows by the said Hugh P. Savigny, that is to say: commencing where a post has been planted at the north-west angle of location 10, Savigny's survey; thence due north astronomically 65 chains 55 links to where a post has been planted; thence due east 41 chains 50 links to where a post has been planted; thence due south 65 chains 60 links, more or less, to a post planted at the north-east angle of location number 10; thence due west 40 chains, more or less, to the place of beginning: reserving an allowance of 5 per cent. on the acreage of the lands hereby granted for roads, and reserving also the right of the Crown to lay out roads where necessary: To have and to hold the said parcel or tract of land hereby granted, conveyed, and assured unto the said George D. Ferrier, his heirs and assigns forever; saving, excepting, and reserving, nevertheless, unto Her Majesty, her heirs and successors, the free uses, passage, and enjoyment of, in, over, and upon all navigable waters which should or might be thereafter found on or under or be flowing through or upon, any part of the said parcel or tract of land.

It was admitted by the defendants that "save and except as to all mines and minerals in, under, and upon the said lands, together with the rights of ingress and of working and mining for minerals in and under said lands, whatever estate, right, title, and interest in mineral location 'S' in the township of McIntyre passed to George D. Ferrier under said grant of 10th March, 1870, is vested in the plaintiff Joseph Kilgour, and proof of the plaintiff's title is at the trial dispensed with."

It was also admitted that the said patent was registered in the registry office for the district of Thunder Bay in March, 1870. And the plaintiff admitted that the lease from the Crown to the defendants which is attacked in this action was registered in February, 1907.

On 20th February, 1907, under and by virtue of letters patent, the Crown demised and leased to the defendants all and singular that certain parcel or tract of land under the water of Current river, passing through and within the limits of mining location "S" in the township of McIntyre, in the district of Thunder Bay, containing by admeasurement 10 acres more or less, as shewn on plan of survey by provincial land surveyor Hugh P. Savigny, dated May, 1868, of record in the department of lands, forests, and mines.

Clause 20 of the said letters patent provides as follows: "It is further expressly agreed and understood that should any litigation arise with regard to the title of the land hereby demised, the lessees, their successors and assigns, will, at their own costs and charges, defend their title and carry on the said litigation and will indemnify Us, as representing the province of Ontario and government and officers thereof, in respect of all costs which may be awarded in connection with the litigation, and in respect of all claims as well for costs as for damages, if any, which may arise or be incurred, or which may be established, against Us, as representing the said province of Ontario, or any officers thereof, by reason of this lease and any connection with the property hereby demised."

The statement of claim alleges (paragraph 5) that the tract of land under the waters of the Current river which His Majesty by the said letters patent purported to demise to the defendants is a part of the parcel or tract of land granted to the said Ferrier, and is now vested in the plaintiff.

The plaintiff asks to have it declared that the letters patent to the defendants, dated 20th February, 1907, are null and void as against the plaintiff, and form a cloud upon the plaintiff's title to the lands covered by the patent of 10th March, 1870; to have the letters patent of 20th February, 1907, delivered up to be cancelled, and to have the registration thereof vacated.

Robert R. Wickam, a civil engineer, who was with Hugh P. Savigny, provincial land surveyor, in May, 1868, when he laid out mining location "S" and planted a boundary post at the north-east corner thereof, stated that the Current river is 64 feet wide where it enters location "S" about two chains from the north-west angle thereof, and runs through the

whole length of the lot, leaving it near the river. The river is very rough and rapid, and is almost a continuous rapid and having a fall of about the north end of location "S" to its mouth. Logs could not be floated down the river, and considerable improvements being made.

James F. Whitson, chief clerk in the court, said that the 10 acres described in the pleadings formed part of the area embraced by the 267 acres covered by the patent granted to Ferrier, and covered the bed of the river.

The patent to Ferrier included the whole of the river, there being no reservation of the water. The Crown could not derogate from its grant, and the defendants of the land under the waters of the Crown.

The Crown had doubts as to its right to the defendants, as it is expressly stated in the pleadings that litigation arise as to the title the lessees of the Crown to the title at their own costs and charges, and against all costs and damages by reason of the connection with the property thereby. The Attorney-General refused a fiat to allow a party to the action.

There will be judgment for the plaintiffs on the motion as asked in the 1st and 2nd paragraphs of the pleadings together with the costs of the action.

BOYD, C.

N.

TRIAL.

McNICHOL v. McPHERSON

*Execution — Sale of Interest in Land —
Action by Execution Debtor to Settle
Execution Creditor — Irregularities in
Adequacy of Price—Resale by Purchaser—
Mistake—Charge on Land—Declaration of*

Action by John McNichol against John A. Davidson, members of a firm of

erson individually, and Mary McNichol, wife of the
ff, to have it declared that a pretended sale of the
of the plaintiff, under an execution issued by the de-
ts the solicitors against the lands of the plaintiff, by
eriff to the defendant G. G. McPherson, was uncon-
ole, invalid, and void as against the plaintiff, and an
resale or transfer to the defendant Mary McNichol
stantial, untenable, and void as against the plaintiff;
or possession and mesne profits; or, in the alterna-
o have it declared that the defendants G. G. McPher-
d Mary McNichol held the land in trust for the plain-
subject to the payment of the execution, if valid as an
brance or otherwise tenable against the plaintiff.

B. Morphy, Listowel, and J. M. Carthew, Listowel,
aintiff.

C. Makins, Stratford, for defendants.

YD, C.:—No evidence has been given to support the
tion in the plaintiff's claim that the plaintiff reposed
ence in the defendants the solicitors respecting the land
estion, or that the said solicitors intervened in any way
fluence the action of the sheriff in taking proper steps
vertise and sell the interest of the plaintiff in the
in question under the execution in his hands at the suit
said defendants the solicitors. As far as the evidence
the sheriff took his own course in the execution of the
and at the appointed time sold the property seized to the
lant solicitor for the sum of \$70. There was an ar-
ment between the said solicitors and the other defend-
wife of plaintiff, that if they became purchasers they
allow her the benefit of the transaction, if she so
d, on paying or securing to them the full amount of
account for costs against the plaintiff. This is the
matter brought out in the evidence affecting the defend-
n regard to the sale. Evidence was also given to shew
ne sale price was far less than the real value of what
ld.

the history of the transaction is this. The defendant
McNichol sued the plaintiff for alimony several years
nd the defendants the solicitors then acted for the

husband, and had against him an unsatisfied judgment. The alimony action was not prosecuted. The husband made an arrangement by which (among other things) he and his band leased the land in question to his wife for a nominal rent. She accepted this in lieu of alimony, and since then lived on the land and brought up a large family of small children, most of who were born on the land. At the end of the 7 years, in February, 1905, she demanded possession from the husband, who refused to go off the land, but asked him to allow her to remain with his family. That he refused to do, she then brought an action, and remained unmolested on the land with her family. The eldest, a girl, being 16 years of age, and the others the place as well as they could, and continued to live there. In September, 1905, the defendants took a judgment against the husband for the sum of \$97, and duly placed in the sheriff's hands the writ which attached upon the interest of the husband in the land, which the sale took place in October, 1905. Prior to the sale, the sheriff advertised the sale in the Ontario Free Press, a local paper, but what other steps he took to give notice. The sheriff died pending this action, and no attempt to prove, from his books or other sources, had been done by him before the sale.

It also appears that in October, 1905, the husband made application by other solicitors, to have the writ set aside, and Court certain questions arising as to the validity of the writ in the land in question under the will of the husband, in which proceeding costs of the various applications were taxed at the sum of about \$200, and the same was paid upon the said lands. By the said will, the husband left his life estate in the land, and the wife a life estate, after the death of her husband, with power to appoint, as the plaintiff may appoint, and, in default of appointment, to persons named.

By the pleading complaint is made that the land, as alleged \$3,500, was sold for \$70. It is alleged that it was not the fee simple, which the plaintiff claimed, but his life estate. Evidence was given that the land was rented for \$150 per year, but based on the fact that it was in good condition. And evidence was given that the average chance for life of a person aged 40 years is about 15 years.

plaintiff's age) would be about 14 years. However, the evidence as to the fair value of the life estate was vague and unsatisfactory, first because the two witnesses who spoke had not been on the land, and it appeared that it could not be well worked during the occupation of the wife and children, and that it would not pay to call in a hired man to assist them—and again because the habits of the defendants were probably not such as to ensure an average length of life. In addition to this, and as affecting the saleability of the interest, there was the charge for costs, \$200, and the possession of the wife, and her claim to be supported if she was dispossessed of the land.

As to the law applicable to these circumstances, it is that the defendants as execution creditors, had the right to purchase to protect their claim. The mere fact that there was no greater audience at the sale than the wife and the purchaser was a matter which appealed to the sheriff's discretion in proceeding with the sale; if he thought that a fair price (under such an enforced sale) was not being offered, he had the power to withdraw the property and postpone the sale. In the absence of evidence, I must assume that he did his duty according to the best of his judgment. He took the risk of being called to account if he acted unreasonably. I cannot say he acted recklessly—he may well have thought that, having regard to the situation, a fair sum was being offered—it was certainly not a nominal but a substantial sum for what was in essence a precarious property, depending on the length of the husband's life. The sale is under process of law, and is conducted by an officer of the law, and the execution creditor has the right to purchase, and is not affected by any irregularities or omissions on the sheriff's part: *Stratford v. Twynan*, Jac. 418, followed in *McDonald v. Cameron*, 13 Gr. 100.

In these sales under process of law, mere inadequacy of consideration or price does not count, unless, perhaps, it is so grave and extreme as to compel a conclusion of fraud or collusion: *Laing v. Matthews*, 14 Gr. 38.

Where the conveyance has been executed by the sheriff, and where the purchaser has entered into a binding agreement to sell at an advance to another person, I find no authority to justify interference to invalidate the deed.

though, it may be, the sheriff has laid charge of negligence in disposing of the land, but I do not say that any such evidence has been given inculcating the deceased officer. If such evidence is given, this action will not bar a direct action against the sheriff or his estate: *Watson v. McDonell*, (1884), 12 O.R. 241.

The action must stand dismissed with costs, and a declaration that the interest sold is the interest of the wife of the plaintiff, subject to the charges of the trustees of the will and to the payment of the costs of the defendants the solicitors. It is for \$1000. The costs include all defendants' costs against the plaintiff and sheriff's fees, etc.

Nov.

DIVISIONAL COURT.

PARKER v. TAIN.

Trusts and Trustees—Action of Ejectment—Settlement—Fraudulent—Improper Joinder of Causes—Amendment—Election—Statute of

Appeal by defendant Minnie A. Henderson of *BOYD, C.*, ante 36, in favour of plaintiff to recover possession of land, and dismissal of the appellant for a declaration that the land is in trust for the plaintiff, and in the meantime the conveyance of the land to the plaintiff is fraudulent.

W. Proudfoot, K.C., for appellant.

W. J. Tremear, for plaintiff and defendant. The claim, was not called upon.

The judgment of the Court (*MERRITT, J.*, *HON. J.*, *ANGLIN, J.*), was delivered by

CREDITH, C.J.:—The plaintiff sued to recover possession of land in question, and the appellant counterclaimed that the grantor of the plaintiff, who was her son, was trustee of the land for her, the appellant, and that the plaintiff obtained the conveyance with notice of the trust, to the fraud of her, the appellant, and alleging that the transaction was colourable, but without any allegation that the appellant is a creditor; without bringing, if indeed it could be brought, the counterclaim on behalf of herself and other creditors of the grantor, she alleges that the transaction is fraudulent as against creditors; and it may be said that the pleading probably indicates that she seeks to have the conveyance set aside as fraudulent.

With regard to the first point, the Statute of Frauds is pleaded, and that is a complete answer to the appellant's claim.

The trust, if there was any—we express no opinion as to the facts—was one resting in parol, and, there being no writing to take the case out of the provisions of the Statute of Frauds, the Chancellor rightly held that the first branch of the appellant's case failed.

With regard to the second branch, for reasons which I have indicated already, no case is made upon the pleading that the transaction is fraudulent against the creditors of the grantor; as I have said, it is not even alleged that the appellant is a creditor, and the counterclaim is made on behalf of all creditors.

Even assuming that the appellant would be entitled to set aside the transaction in the same way as a plaintiff would sue, the law shews that a plaintiff is prevented from setting up two distinct causes of action, unless they arise out of the same transaction. For that, *Stroud v. Lawson*, [1898] 2 Q. B. 44, is cited; and there are other cases to the same effect.

The appellant asks that leave should be given to amend; and, admittedly, if she amended, it would be for the purpose of setting up to abandon the other cause of action and proceeding upon the claim to set aside the transaction as fraudulent against creditors. We think that leave to amend should not be given in such circumstances, but that the appellant should be left to bring her action, if she so desires, to set aside the transaction as fraudulent as against creditors.

The result is that the appeal will be dismissed, but a provision may be inserted in the order to be without prejudice to any action which the grantor may be advised to bring to set aside the order in favour of the plaintiff.

N

DIVISIONAL COURT

QUACKENBUSH v. H

Mortgage—Discharge—Intention to take—Subrogation—Chargee of Land as Surety for Owner—Extension of Lease of Surety—Declaration of Costs.

Appeal by the adult defendant, against the judgment of MAGEE, J. (7 O. W. 1907) subsequent judgment in June, 1907, on the facts, parties and hearing further evidence, the plaintiff is entitled to have his rights under the mortgage in priority to defendant's title, and that the mortgage had been discharged by giving to the plaintiff Quackenbush.

C. J. Holman, K.C., for the appeal, submitted that there was mere passive inactivity and delay on the part of the plaintiff to extend time.

J. H. Spence, for plaintiff, contra.

The judgment of the Court (MAGILL, J., HON. J., ANGLIN, J.), was delivered by

MEREDITH, C.J.:—The law is settled, and the question in issue is one of fact only.

We are not embarrassed by any question of law, learned Judge, in the sense of his p

that was agreed upon as amounting to a bargain to the time upon the acquisition of the mortgage by the mortgagor.

The part of the case that is in question is dealt with in a few words, at p. 290 of 7 O. W. R. After referring to the fact that the respondent had notice that William was the principal debtor and the respondent a surety, the learned Judge says: "Having this knowledge imputed to her, she entered into an agreement, oral but binding upon her in writing, from the execution of the deed, to give a substantial extension of time to William. That agreement, so binding, would ordinarily relieve the surety from liability and entitle him to have his property released from the mortgage, unless so far as she reserved her remedies against him or it."

Apparently the learned Judge's view was that, inasmuch as the purpose of the whole transaction was that more time should be given to the mortgagor, and a deed had been executed on the faith of that, a contract must be inferred to extend the time for payment of the mortgage debt. At the time it struck me that the reasoning was well founded, and on further consideration, I find considerable difficulty in following the reasoning.

It is clear that the evidence shews, at most, is that the respondent expressed her willingness or her intention to be lenient to the mortgagor in respect of the mortgage indebtedness. If there was nothing, it seems to me, in the shape of an agreement binding her to extend the time for payment, and, while it might have been an unexpected thing if she had, immediately after having acquired the mortgage, proceeded to foreclose, I do not see what answer the mortgagors would have to an action for that purpose. If she had brought an action the next day after the assignment, it would not have been necessary for the mortgagors to have proved an agreement which tied the hands of the mortgagee from foreclosing.

I can see no evidence of an agreement which would bind the mortgagee. I can see nothing more than the extension of generosity and kindness from the one to the other in relieving the mortgagor from one that was pressing, or who it was feared might be forced to pay for the debt.

With great respect for the view of my brother Magee, I think his judgment must be reversed, and that so much

of the judgment as postpones the claim of the respondent's claim must be set aside.

The action should not be dismissed. plaintiff is entitled to redeem.

The judgment should be drawn declar the appellant as we have found them, and ment will be drawn up to follow that.

The costs will be added to the mortgage

THE ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, NOVEMBER 28, 1907. No. 27

RIDDELL, J.

NOVEMBER 18TH, 1907.

TRIAL.

WILLISON v. GOURLAY.

Executors—Legacy—Inoperative Direction to Invest Principal—Action for Legacy—Costs—Confinement to Costs of Summary Application—Executors Relying on Advice of Solicitor—Personal Liability of Executors—No Recourse against Estate.

Action by Barbara Willison against the executors of her deceased mother, Jane Gourlay, to recover the amount of a legacy, \$600, less \$50 paid.

W. J. Elliott, for plaintiff.

J. B. Clarke, K.C., and C. Swabey, for defendants.*

RIDDELL, J.:— . . . The late Jane Gourlay, by her will, bequeathed (among other bequests) to her daughter Barbara, the plaintiff, the sum of \$600, and added: "I direct that all money coming to my daughter Barbara be invested by my executors, and the interest only and \$5 yearly be paid to her." This was modified by a codicil whereby it was directed that the plaintiff should receive \$50 the first year and \$15 of the principal yearly thereafter. Of course, if

* The counsel for the defendants at the trial should not (by inference) be identified with the solicitor who advised the defendants before action, nor with the solicitor on the record. The two solicitors referred to were not in any way connected with the counsel.

this direction were followed literally, th
to live 37 years to receive her legacy in
the executors, thought she was hardly
the \$50, and desired to pay the remain
that they could not, in view of the prov
legally do so. They allege that they
(not the solicitor on the record), and
that they must invest the remaining \$
will, and must pay this sum to her.
plaintiff. I had the opportunity of seei
tors in the witness box, and I can safely
executors acted in perfect good faith,
to pay over the balance solely because
would not justify them in doing so.

Our Rules 93 et seq. provide a simp
tious method for the decision of just
these Rules are being applied every da
the plaintiff, being, as is said, of the op
did not apply, issued a writ of summon
the practice spoken of. Upon the deli
of claim, it was the plain duty of th
admitted the facts, taken objection to
ceeding, and to have submitted themse
to the Court. Instead of this, a defence
after admitting the facts, it was plead
died on 27th October, 1906, and the de
the action has been prematurely comm
dismissed with costs." At once orders
out on both sides, and served, for what
I am unable to conceive. Then the soli
wrote to the solicitors for the defenda
think they would "require to examin
there are no facts, so far as we can see,
question is one of law, and would it no
it summarily on a motion: we would c
is the first step in the proceedings that
the suggestion been acceded to, the cost
much increased. Instead of falling in
as he should have done, the solicitor for
saying that he thought it quite necessar
examined, at all events the defendants,
have all the facts before him—and adds
can be examined at Guelph with very

he case came down to trial. The plaintiff was called, proved the receipt of the \$50, and the statement by the defendants to her that she could not have the remainder. Counsel for the plaintiff refusing to admit that the defendants acted upon legal advice, one of them was called to prove the fact. Both these facts should have been admitted.

Counsel for the defendants admit that the direction to the executor contained in the will is utterly invalid, and that there can be no question that the plaintiff is entitled to be paid the value of her legacy at once, and to an assignment of the security if a security has been obtained. It is necessary, therefore, only to consider the question of costs. This I repeated that I might see if there were any possible excuse which could be found to justify any of the proceedings in this action. I have looked at the text-books and the authorities, and now dispose of the costs.

That the advice of the solicitor first consulted (if it was given to) was wrong and inexcusably wrong is clear. For more than 60 years it has been certain that with a bequest of this kind the legatee is entitled to be paid at once.

Following a well known English Judge, one may say, "Heaven forbid that a solicitor, or even a Judge, should be expected to know all the law!" Our law can, in its entirety, only be found by an examination of the "codeless myriad of precedents" of decision in former and present times, and of authorities that are in themselves a library—and no one head can carry all that knowledge. Many questions, too, are not decided, and no solicitor can be quite sure of what the law may be—the best he can do is to give his best judgment. There are some principles that are beyond controversy, and that no ingenuity can gainsay; and one of these is that involved in this case.

The executors, then, have acted wrongly, and should pay the costs as have been rightly incurred. The solicitor for the plaintiff cannot be permitted to increase the costs through his mistake in practice. The costs then to be paid to the plaintiff are only such costs as would have been allowed had cheaper practice been adopted.

The question remains whether the defendants are to be allowed to charge these against the fund, viz., the legacy to the plaintiff, or, if not, against the general estate. It would be unjust to make the plaintiff pay the costs of obtaining the fund, costs which became necessary through the mistake

of the defendants, for which she is in And why should the "estate" pay? "costs out of the estate;" but that means beneficiaries under the will have to pay the executors, a result which I shall not use my power legally to prevent it. There are persons (in the assumption that the executor, upon the advice of the solicitor said to be consulted), namely, the beneficiaries and the executors; on one of these must fall a loss; the loss should fall upon those whose money is lost. The Rules leave the costs in my discretion. By provision, Rule 1130 (2), that "nothing shall be done to deprive a trustee, mortgagee, or other person of his costs out of a particular estate or fund unless he is entitled according to the rules acted upon by the Judicature Act, 1881, in courts of equity."

There can be no doubt that the usual rule is that if litigation is occasioned by difficulty in carrying out the will of the testator himself, the costs should be paid by the testator, in some cases the parties. I do not find any such rule laid down where the executor is not at all in the will, and the litigation is occasioned by a wrongful though honest act of the executor. The fact of legal advice being taken does not take away from the fact that simply establishes good faith, and the costs should be paid by the executor. Amongst many cases I find *Talbot v. Maule*, 285, L. R. 4 Eq. 661, L. R. 3 Ch. 622. In that case the executor had acted in good faith (see L. R. 3 Ch. 622). The Vice-Chancellor had, in fixing the costs of the plaintiffs in litigation, occasioned by the wrongful though honest acts of the trustees, a result which I shall not use my power legally to prevent it. The Court on appeal, however, held that the defendants should pay the costs of the estate. The Court on appeal, however, held that the defendants should themselves pay these costs, and the Court (L. R. 3 Ch. 633) "to leave the hostile parties to pay the costs of the proceedings, and exonerate the general executor." Even in England it will be seen that the rule requiring the payment of costs of execution out of the estate or fund. And the cases in Ontario as to the protection to be given to executors in the event of a humble judgment, be read with caution. There the executor has no

he takes upon himself an onerous duty, and is unpaid; on the contrary, he is paid a reasonable sum for his satisfaction, and his services are not rendered gratuitously. Of any difficulty the Courts are always ready to relieve the executor, and there are many companies willing and anxious to administer any estate. One who accepts the position of executor must understand that if he omits to act prudently, he must suffer the consequences, as any other person

The result is that the executors will personally pay the costs of the plaintiff, properly incurred, and they will not be ordered to pay these out of the estate, nor to receive their own costs out of the estate.

They have the less regret in being obliged to make this disposition of the matter, as, unless there is more in the case than yet appears, they cannot be liable for the costs of their defence; and as to the costs they are ordered to pay, they have no real cause of action against the solicitor upon whose advice they have acted, if such is the fact; and, if such is the fact, they should rightly suffer. If I had thought that the estate should pay the costs of plaintiff and defendants, I should have deducted from the amount now given to the plaintiff, the amount by which the defendants' costs were increased by the wrong method of procedure taken by plaintiff. Nothing that has been said should it be considered that it charges the solicitors with bad faith, but the wrong advice of the executor (if the executors are telling the true story) has occasioned needless litigation, and the others have made that litigation needlessly prolonged and costly.

The order will be as in *In re Hodgkinson*, [1893] 2 Ch. With the exception of the costs already spoken of as payable to the plaintiff.

J.

NOVEMBER 18TH, 1907.

TRIAL.

BURLEY v. GRAND TRUNK R. W. CO.

*Accident—Shunting Car—Injury to Conductor Crossing
Back in Yard—Consequent Death—Proximate Cause
Injury—Accident—Conjecture—Findings of Jury—
Motion for Nonsuit.*

Plaintiff by Steven Burley, administrator of the estate of
John Burley, deceased, against the Grand Trunk Railway

Company, for damages for having caused the deceased owing to their negligence.

J. R. Logan, Sarnia, for plaintiff.

W. J. Hanna, Sarnia, and W. E. [unclear] defendants.

CLUTE, J.:—Alonzo Burley was a defendant's railway, and left Sarnia on charge of a train for Mimico, by way of [unclear] reached London East about 11 o'clock [unclear] then found that the engine required to go to the repair shop for repairs. The order for this [unclear] the conductor to the engine-driver [unclear] station platform, London East. The [unclear] the order, leaving the conductor on the [unclear] last time, so far as the evidence shewed [unclear] was seen alive. The platform was on [unclear] tracks, which were 3 in number; the [unclear] bound trains; the second track for east-bound [unclear] third track for waiting trains. There [unclear] west of the station and north of the track [unclear] yard, and also a switch to the east of the [unclear] the tracks leading into the repair shop. [unclear] had come in and stood on the second track [unclear] the station, when the conductor gave the [unclear] driver. There was an engine and train [unclear] west of the station at this time. This [unclear] loaded with material which had been on [unclear] shop. It would appear that this order [unclear] about the time that the conductor and [unclear] train were talking on the platform. [unclear] the repair shop by what is called a drop [unclear] is, the car and engine were cut from [unclear] the engine, which was in front of the car [unclear] the station was checked, and the brake [unclear] car from the engine, and the engine then [unclear] first track easterly past the switch, then [unclear] and the car run into the repair shop [unclear] after the car had passed, the body of the [unclear] by the night watchman at Rectory street [unclear] the first track south of the station on [unclear] crossed the track at right angles east [unclear] shoulders were on the south rail of the

th. and the rest of his body between the rails. The broken
s from his lantern, the pencil which he carried, and his
and a lock of his hair, were found a few feet west of the
t boundary of Rectory street. No one saw the accident.
injuries found on his body caused death instantly. His
p. as the report of the post-mortem shewed, "was clearly
from the root of the nose over vertex to back of
peeled off from skull, and filled with dirt and blood.
skull and right orbit shattered into many pieces, and
n tissue disorganized. The upper jaw on the right side
tured, and also lower jaw about the centre. There was
ruise or dislocation of the left shoulder, and bruises from
side and shoulder to the hip. A punctured wound on the
leg 3 inches above the ankle"—and many other severe
uries and bruises.

The plaintiff's theory was that the deceased had entered
n the track in crossing to his train after the engine had
sed, and was run over by the shunting car.

The defendants suggested that he had attempted to climb
the car as it was passing, and had got his leg entangled,
had dragged behind the car, and was finally thrown on
track. The engine carried a head-light and a rear light.
yardman, who uncoupled the engine from the car, carried
ntern on his left arm. He was on the south side of the
standing with one foot on the engine and one foot on the
facing the car, and looking west, when he uncoupled the
ine. The ladder on the car was immediately opposite to
. After uncoupling the car he climbed up the ladder
n the lantern still on his left arm, still facing west. He
uld take, according to the evidence, about 3 seconds to
h the top of the car. He then proceeded on the top of
car to the rear brake, with the lantern still on his left
a. There was no one in front of the car, as it proceeded
r it was uncoupled, to give notice of danger, and no light.

The company's rule 219 provides that "when a train is
ng pushed by the engine (except when shifting and
ing up trains in the yard), a flagman must be stationed
a conspicuous position on the front of the proceeding car
immediately signal the engine-man in case of danger." It
in evidence that at night the flagman under this rule
st carry a light. There is no rule which provides for a
p or flying shunt, as in this case.

The jury found that the defendants were negligent by not having the car protected by the rules. Having regard to the charge on question 4, I take this to mean that in my opinion . . . there should be the same protection provided by the rule above quoted. The personal injuries resulting in the death of the conductor, were caused by reason of the yardman who was in charge of the engine not having the car properly protected by lights on the car while being dropped into the siding. The deceased could not, by the exercise of reasonable care, have avoided the accident under the circumstances; and they assessed the damages at \$1,080.

At the close of the plaintiff's case I directed the jury, upon the grounds (1) that no case was made out under Campbell's Act; (2) that there was no evidence of negligence; (3) that there was no evidence to say how the deceased came to his death.

These objections were renewed at the trial. I think there was quite sufficient evidence on the part both of the father and mother to support an action. The damages assessed were well within the mark. Something was expected of their receiving further benefit from the insurance. The amount by reason of the insurance was fixed. A subsequent day was fixed for the trial. No further argument took place, but, on the day fixed, the father appeared with counsel, desiring judgment to be entered for the plaintiff or nothing, with the view, as I took it, of the father wanting to go to the Court of Appeal in case the judgment was against them.

As to the second ground of objection, there was evidence of negligence which could not be set aside by the jury. The car, after it was uncoupled from the train by any one on the front of the car with the view of passing, and the jury might well find, I think, that having passed, the car should have been stopped. The deceased was in the discharge of his duty in attempting to get the car off the track to reach his train. He had no fault to find with a car which would follow without warning. The

the defendants were guilty of negligence by not having car properly protected by light on the front of the car being dropped into the siding, was well supported by evidence. It is difficult, I think, to conceive of a prae more negligent and likely to cause injury than permit at night the flying shunt to be made without any person, ght, to give warning of the approaching car.

In support of the further point that there was no evidence enable the jury to say how the deceased came to his death, Wakelin case, 12 App. Cas. 41, was relied on, but I think present case is distinguishable from the Wakelin case. That case the train carried a head-light, which a person for a mile down the track could see. In the present case, the engine carried a head-light, the car was allowed to w without light or other protection. The engine, so far a warning the deceased of the approach of the car, was er likely to mislead him. Having regard to the evidence to the injuries upon the body and the finding of the lantern other articles belonging to the deceased, there could be no onable doubt, in my opinion, upon the findings of the jury, the deceased had passed between the engine and the car, that the car passed over him. It was a fair inference the jury to draw that if the car had been properly prod he would have been warned. In other words, there evidence that the negligence of the defendants was the imate cause of the accident.

There is much in *London and Western Trusts Co. v. Lake and Detroit River R. W. Co.*, 12 O. L. R. 28, 7 O. W. 11, that throws light upon the present case. The de here, as there, was in the discharge of his duty, and not e licensee, as in *Batchelor v. Fortescue*, 11 Q. B. D. 474, *Hutchinson v. Canadian Pacific R. W. Co.*, 17 O. R. 347. e present case the servants of the defendants who sent ar down the line without protection ought also to have ipated that other persons might be engaged in the perance of duties upon the line who might be injured if the tting of switching the car was negligently conducted.

That is said by Osler, J.A., in the *London and Western ts Co.* case as to the contributory negligence of the de nts, applies with equal force in the present case: "It t be laid down by this Court, in following any autho- by which they are bound, that, as a matter of law, a n who, in the exercise of a right or the performance of

a duty, attempts to cross the railway track to see whether a train is approaching, is guilty of negligence as ipso facto to deprive him of the right of way. If he is struck by a train or car and is injured, the railway company is liable. See *Phillips v. Grand Trunk R. Co.*, 32 O. R. 28.

To one listening to the evidence it seems clear how the accident happened. The conductor of his duty was proceeding to his train, and he allowed it to pass, and proceeded to cross the track. He was overtaken by a car of which he received the fatal blow.

The plaintiff also relied upon section 2 of the Act, which provides that "whenever in a village, any train is passing over or along a highway, and is not headed by an engine moving in an ordinary manner, the company shall station a person to warn persons standing on or about to cross the track of such railway." In this case, most, a person who shall warn persons standing on or about to cross, the track of such railway.

This section as now framed seems to require the company to make provision for passing over or along a highway, and to make provision except in respect of some cases where a person is standing on or about to cross the track. At the same time it is, I think, fair to presume that the conductor would have knowledge of the position of the train, as it would be likely to arise in the ordinary course of employment, and as there was a highway crossing the track east, which the engine would have to cross. It is urged that the deceased should be considered as standing on or about to cross the track about to cross the highway, unprotected by the provisions of the Act.

The question as to when a case may be referred to a jury, where the facts to be found may be inferences to be drawn from circumstances, was considered in *Moxley v. Canada Atlantic R. Co.*, 31 O. R. 319-20; affirmed 15 S. C. R. 146.

At the request of both parties, the jury was asked to consider the distance between the car and the deceased, and on request of defendants' counsel to satisfy themselves as to whether or not the car had passed over the body of the deceased.

Having regard to all the facts and circumstances of the case, I am of opinion that it could not have been properly withdrawn from the jury, and that, upon their findings, the plaintiff is entitled to a verdict for \$1,090, with costs of action.

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

MCGUIRE v. GRAHAM.

Vendor and Purchaser — Contract for Sale of Land Made with Clerk of Vendor's Agent—Ignorance of Vendor of Position of Vendee—Right to Repudiate on Discovering Truth—Duration of Agency—Termination of Authority—Vendee Acting as Representative of Actual Purchaser.

Appeal by plaintiff from judgment of MACMAHON, J., O. W. R. 370, dismissing an action brought by George McGuire against Mrs. Graham and one Hill for specific performance of an alleged agreement to sell to plaintiff the premises No. 190 King street west, in the city of Toronto, owned by Mrs. Graham. MACMAHON, J., held that Mrs. Graham, the vendor, who was, as she stated, ignorant of the position of defendant Hill, with whom she entered into the contract, was the manager of the business of A. G. Strathy, her agent and broker for the sale of the property, was not bound by his act, and that plaintiff, who was the real purchaser, and to whom Hill assigned his right, could not succeed in enforcing specific performance.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., and RIDDELL, J.

C. Millar, for plaintiff.

H. H. Kilmer, for defendants.

RIDDELL, J.:—The defendant Mrs. Graham, the owner of the land, and the plaintiff, an intending purchaser, were

both willing the one to sell and other at a price fixed. The owner (through objecting to sign a certain form of offer objected (through his broker) to have any offer to purchase. In this impasse an employee of the plaintiff's real estate self to sign the contract for sale and take through. He did so, it being the usual should at once assign to the plaintiff. Graham appears, at the time the contract have known who the defendant Hill assigns to the plaintiff. All this takes place 1906. Upon 2nd January, 1907, the first after, the solicitor for defendant Mrs. position of Hill, but on 4th January conveyance.

Hill had nothing to do with fixing of sale.

Under these circumstances . . . that Hill was in fact the real purchaser doing was in the supposed interests of assisting in carrying out a proposed sale. He was, it is true, incurring a liability understanding with the plaintiff, and putting self into an awkward situation if the plaintiff was unable to accept the transfer and —but that we need not consider.

The cases cited by the trial Judge show the duty of an agent to his principal, and the principal to repudiate a sale to an agent, the rules about which there can be no question. The humble judgment, apply in the facts of

I would allow the appeal with costs, and the usual judgment for specific performance.

FALCONBRIDGE, C.J., agreed, for reasons.

BRITTON, J., dissented, for reasons

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

RE SHAFER.

*Insurance—Benefit Certificate—Direction of Assured
as to Disposition of Fund — Construction — Division
among Wife and Children—Income—Corpus—Vested
Interests—Application of Doctrine in Regard to Wills.*

Appeal by Daniel L. Shafer and cross-appeal by the
widow of George Alfred Shafer from order of RIDDELL, J.,
409.

W. E. Middleton, for Daniel L. Shafer.

M. Ferguson, for the widow.

J. C. Cameron, for the infants.

G. F. Lawrence, for the Toronto General Trusts Cor-
poration, trustees.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE,
J.) was delivered by

BOYD, C.:—Upon affidavit evidence it appears that the
deceased, George A. Shafer, obtained a certificate of beneficiary
from the Ancient Order of United Workmen, for
\$80, in 1885. He died intestate in December, 1894. The
Toronto General Trusts Corporation now represent his estate,
which consists of nothing else than the proceeds of this in-
vestment, which is now in their hands bearing interest at the
rate of 4 per cent. The deceased left a widow and 5 children,
4 of whom (males) are over 21 years of age, and 2 are
under 21, a girl aged 19 and a boy aged 13. The 3 sons now
appear to be doing for themselves as carpenter, baker,
and railway employee. By the terms of the certificate the
\$80 was to be paid "at death to his executors, to be put
to rest. Interest to be paid to his wife for benefit of her-
self and children. In event of wife marrying again or in
her death, interest to be paid to his children until the
eldest became of age, when the principal is to be equally
divided among them." The interest, \$80, has hitherto been
paid to the mother, and the application now is by the eldest

son to be paid one-sixth of the corpus in appeal declares he is entitled to one-sixth from year to year, and declares himself not to have paid any share of the principal. The court's present payment of a share of the corpus is based on appeals in that any apportionment is made out of the interest, she claiming to receive one-sixth of the interest. The court's present apportionment proceeds on the theory that the corpus is jointly entitled, and that each is entitled to one-sixth of the income.

The evident purpose of the assurance is that his scanty means a fund of \$2,000 for the support of his family, which should be exempt from taxation. The widow is to get no part of the annuity until she is to be distributed at her death (or reversion) when the youngest child is of age. But by will she is to receive the whole of the interest until the youngest child is of age, it for the benefit of herself and the children. The executors and administrators (administrators) are discharged when they pay it to the widow (as the mother) and she disposes of it for herself and the children (and is a widow.) He does not live until the youngest child is of age, being alive when the youngest child is of age. The will does not in terms provide for that situation. The mother is to draw the interest, charged with the interest of the children. One would naturally say that the mother is the recipient of the income because the mother is in her as the head of the house after the father's death. Her duty was to keep the family together and have them maintained out of this fund. The mother would go, with the mother to manage the money as best she could. It was the duty of each child on coming of age should claim the interest of the mother—much less should claim the interest of the mother. Nor was it the duty of each child on coming of age should receive a divided share of the income. As such, the mother is intrusted with the whole yearly proceeds of the fund, in discretion in doing by each child and the mother's family needs and requirements. . . . The mother, on coming of age is not expected to draw the interest of the income, and leave the mother in a state of active destitution. So long as the whole

is honestly handled and fairly and reasonably expended for the support of herself and her children needing it, the opinion of the husband will be satisfied. The arm of the will is not to come between her and the reasonable exercise of her judgment in providing for the necessities of herself and her children. It may naturally be expected that as the children come of age and go off from home and begin to earn a living for themselves, their claims upon the small fund will diminish, and they will agree to their mother having all for her own use. But that is not presently a matter to be dealt with. All that need be said is that the mother may so act or the children themselves who are of age may be so advised as never to give occasion for legal interference in the future.

To think a fair reading of the certificate, coupled with the soundings of the family, induces the conclusion that the intention of the deceased will be fully carried out by the administration of the yearly proceeds of the fund on the above lines. The certificate, as read in legal phrase, means that the mother is life tenant of the income—sole life tenant—not jointly with the children—but under obligation to apply it with the same for their benefit—the support and maintenance of herself and the children in such proportions as she may deem expedient in the honest exercise of the discretion reposed in her by the husband.

The certificate is in the nature of a testamentary provision, and authorities upon wills shew the lines of decision applicable to the legal import of this instrument. . . .

Reference to *Gilbert v. Bennett*, 10 Sim. 372; *Bowden v. King*, 14 Sim. 115. *Jubber v. Jubber*, 9 Sim. 503, distinguished. Reference also to *Chambers v. Atkins*, 1 Sim. 382; *Crockett v. Crockett*, 2 Phill. 561.]

If a joint holding had been intended, the fund would have been transferred to the mother, but would have been directed to be held in trust for equal benefit of mother and children. Here that view is emphasized by the fact that the certificate does provide for an equal division among the children of the \$2,000 fund, but as to the income gives all to the mother charged for the children. . . .

Reference to *Briggs v. Sharp*, L. R. 20 Eq. 319; *Re [1899] 2 Ch. 285]*

do not dwell on the difference of meaning that may exist between the word "benefit" used in this certificate

and the word "maintenance" used in have cited. "Benefit" is susceptible than "maintenance," but when it comes to handling \$80 per year for the benefit of children, "benefit" will exhaust its resources of their necessities, and becomes equivalent to "maintenance."

The ordinary meaning and the legal significance being in accord, there is nothing in S. O. 1897 ch. 203, sec. 159 (7)), which would lead to a different result. True it is, the Act declares that more beneficiaries are designated, but when a choice among them is made, all the beneficiaries are to share equally in the same." What is evident by reference to the whole section is that the money referred to is the insurance money—the amount in the case the \$2,000: see sec 157, sub-section 2. The Act provided for as to its apportionment among the beneficiaries, certificate, and goes equally among the beneficiaries. In the case of a wife's death (or earlier if she marries), however, while suspending the distribution of the money insured, provides for its investment of an income, to be paid to the widow. If the income for income falls outside of the scope and is in no way against its policy; it is a very reasonable but highly commendable. This sub-section is provided to his widow, who is to apportion the money in her own judgment and discretion, among the children, according to their varying needs. The apportionment of the principal and interest of the interest by the terms of the policy, the latter to be regulated and controlled by the policy.

The decision under review appears to be holding that the children are equally entitled to the yearly interest, and in directing the interest of it to the eldest son. That son's appeal from the cross-appeal of the widow is allowed; the interest should be paid by the son and the interest failed.

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

REX v. BRISBOIS.

or License Act—Conviction for Selling without License—Imprisonment of Defendant—Habeas Corpus—Certiorari—Right of Court to go behind Conviction and Look at Depositions—Absence of Evidence to Sustain Conviction—Justices' Notes of Evidence not Signed by Witnesses—Discharge of Prisoner.

Motion by the defendant, on the return of a habeas corpus and certiorari in aid, for his discharge from custody on a conviction for selling intoxicating liquor without license.

J. B. Mackenzie, for defendant.

J. R. Cartwright, K.C., for the Crown and the convict-magistrates.

The judgment of the Court (BOYD, C., MAGEE, J., MAGEE, J.), was delivered by

BOYD, C.:—By sec. 5 of the Ontario Habeas Corpus Act, R. S. O. 1897 ch. 83, a writ of certiorari may issue in aid of the main writ, providing for the return of the evidence, depositions, conviction, and proceedings, that the same may be viewed and considered by the Court, and to the further effect that the sufficiency thereof to warrant the restraint be determined. That clause was first before the Court in *Regina v. Mosier*, 4 P. R. 64, and the practice was then established that the Court is bound to examine the proceedings anterior to the warrant and see if they authorize the conviction, and, if not, to discharge the prisoner. This case and this course were approved in *Regina v. St. Clair*, 27 A. C. 310, 318, 319.

This case is one of conviction under the Ontario Liquor License Act, and by R. S. O. 1897 ch. 90, sec. 1, the proceedings are to be conformable to the like proceedings under the Criminal Code. That introduces the practice as to

the taking of evidence; witnesses are evidence is to be taken down in writ deposition, which is to be authentic of the justice: Criminal Code, secs. 85 witness need not sign: sec. 856 (3). provisions of the Liquor License Act, sec. 99, in all cases the evidence of th shall be reduced to writing—shall be by the witness. Here the evidence is v in writing, and is not signed by the wi

Formerly it was necessary to set the face of the conviction, and, if any isted as to some fact necessary to give ceeding would be quashed. If it now of the evidence, in response to the cert tial element necessary to a conviction to the Court to quash. In this return absence of evidence upon the materia having been sold by the prisoner. H place where the liquor was kept, but he sold or handed out the liquor. V but it is the important fact, which If the justices have omitted to take d evidence, they have only themselves t liberty of the person is involved, the case where the matter would be rem to take further evidence on the point o being before the justices on this head jurisdiction in making a conviction: F 607.

The direction to take the evidence far as possible, in the words of the w tection of the magistrates themselves serve a record of the material on wh founded, in case of ulterior proceeding not presume in favour of the inferior he has done his duty unless he tells the acts," and his jurisdiction must "appe of his own mouth." See *Regina v. W* 490, and *Rex v. Johnson*, 1 Str. 261.

Upon the return of the proceedings, is no evidence to support the convicti and the prisoner must be discharged.

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

LAWSON v. CRAWFORD.

*Injunction—Interim Order—Contract—Prima Facie Right
—Mining Operations—Interference—Threats—Dissolu-
tion of Injunction Obtained ex Parte.*

Appeal by defendant from order of ANGLIN, J., ante 602,
continuing an interim injunction until the trial.

S. R. Clarke, for defendant.

H. H. Watson, K.C., for plaintiffs.

The judgment of the Court (BOYD, C., MAGEE, J.,
MAGEE, J.), was delivered by

BOYD, C.:—The clause in the Judicature Act, sec. 58,
sec. 9, does not give any new right to claim an injunc-
—does not extend the jurisdiction of the Court, and
not alter the principles upon which the Court gives
—relief by interlocutory injunction.

In this case the materials filed shewed a prima facie
—to ask an injunction, and the order was made ex
—e. On the motion to continue, it is open for the defend-
—in shewing cause to claim that it should be dissolved,
—proper case appears on the new material then before
Court: McCuaig v. Conmee, 19 P. R. 45.

The case presented ex parte is quite displaced by the viva
evidence given by the president of the plaintiff com-
—The interim injunction was to restrain the defendant
—interfering with the mining operations now being car-
—on by the plaintiffs upon the location in dispute (granted
—arte 5th July, 1907). The only affidavit filed was one
—the solicitor setting forth information derived from one
—a, plaintiffs' agent on the location, to the effect that the
—dant and his men were filling up the trenches and the
—which the plaintiffs were digging in the course of their
—g operations. Upon the facts it now appears that
—is a travelled road running through the location, on
—public money has been spent, and that there is a

house facing on that road which is owned by the defendant as tenant of the defendant—who has a right of way to the est in the mining location. The work consists in digging a trench or ditch on the road leading to this house, with a view of making it possible for the plaintiffs to get to the house. The defendant said that West was selling whisky to the plaintiffs and that the plaintiffs wanted to get him out of the house. The defendant did was to fill up the trench in front of the house so that he got access to it from the road, and the defendant complained of and misrepresented in Flynn's report that way, through the solicitor, misrepresented the true state of facts is admitted by the president of the plaintiff company: "The reason for digging the trench was because West was selling whisky to the plaintiffs that was the principal object—to get West out of the house. The substratum of the application for an injunction is absolutely no evidence that the mining operations have been interfered with, as alleged in the report on which the Court was set in motion. It is not sufficient to support the injunction on the ground that the defendant threatened to interfere with the plaintiffs' operations. I find no such evidence, not even in Mr. Flynn's report as was referred to. There is, no doubt, a valid title to the Crawford title to the whole of the land. They desire to proceed at once to work on the land. Interference by the plaintiffs; and therefore the plaintiffs will be held responsible for the delay in getting to work. It is not sufficient that the defendant intends to block off the road of the plaintiffs in the course of mining operations. It suffices to make amends for the original wrong done in Court. In brief, no overt act of interference has been proved—is disproved—and no evidence of any threatened interference anticipated which would call for the issue of an injunction of the Court, even if the motion had been granted. It is presented on that line. See *Castelli v. Co.*

The appeal should be allowed, the injunction set aside with costs to defendant of motion and of appeal in the cause. This order to be with effect from the date of future application for injunction on point.

RTWRIGHT, MASTER.

NOVEMBER 19TH, 1907.

CHAMBERS.

RUSSELL v. RUSSELL.

Notice of Trial—Regularity—Close of Pleadings—Action to Establish Will — Defence Setting up Agreement with Testator—Joinder.

Motion by defendant D. Russell to set aside the notice of trial as irregular under *Irwin v. Turner*, 16 P. R. 349, and an action to establish a will.

J. E. Jones, for the applicant.

W. H. Blake, K.C., for the plaintiffs, the executors.

F. J. Dunbar, for the added defendants.

THE MASTER:— . . . The moving defendant opposes probate on the usual grounds. He also asks to have relief in respect of an alleged agreement made 20 years ago with him by the testator to leave him all his property on which he would stay and work the farm, which he says he did. This is not strictly a counterclaim. Indeed that word does not occur in the statement of defence. The plaintiffs here do not, in the usual sense, making any claim against the defendant. But, no doubt, the whole matter may properly be tried at the same time, as was done, e.g., in *Dixon v. Butt*, 9 O. W. R. 392, though there it was strictly a counterclaim as an alternative defence, and that was afterwards referred to a matter of reference and not disposed of at the trial.

Here the only important question is, whether the cause was at issue on 14th November instant, when the notice of motion was served. It was stated in support of the motion that the defendant D. Russell desired to have the added defendants examined for discovery. It was stated by Mr. Dunbar, and not denied, that his clients were quite ready if the defendant so desired, and that in fact an examination had been fixed for to-morrow.

Here there is no claim against the added defendants different from that made against the plaintiffs, with whom the defendants make common cause, and no new issue is raised by their being added. Therefore, the whole ground

of decision in *Irwin v. Turner* is lacking that the motion should succeed.

If the will be set aside, the defendants must stand over until a personal representative is appointed. On that see *Mountjoy v. S.* In this view, it seems questionable whether Russell's claim is not somewhat premature. It need not have raised it in this action. The defendants seem desirous to have the questions raised, but there is no reason why they should raise the matter before the trial Judge.

In *Irwin v. Turner* there were no objections by defendants on their counterclaim. It may be a sufficient ground of distinction in this case. Under the general spirit of the rule, the substance is to be considered rather than the conduct of the parties seems to require that the motion should go to trial.

The motion will, therefore, be dismissed against the mover to the other parties.

CLUTE, J.

N.

CHAMBERS.

PERKINS v. FR.

MCDONALD v. RECORD PR.

CURRIE v. RECORD PR.

Libel—Several Actions against Different Defendants—Consolidation—R. S. O. 1897 ch. 68.
Libels.

Motion by defendants, under R. S. O. 1897 ch. 14, for orders consolidating the first 19 actions with 20 others by the same plaintiff against the second with 19 other actions, and the other actions.

W. Nesbitt, K.C., and E. T. Malcom for defendants.

G. Grant, for plaintiffs.

CLUTE, J.:—These actions relate to alleged libels by defendants in publishing certain statements with reference to the proceedings taken against plaintiff Perkins on a charge of murder.

Mr. Nesbitt argued that while the different writings differed in form they were all substantially the same libel. They all referred to the charge of murder preferred by the Crown. Upon examining the statements of claim it will be seen that in a number of cases the publication in respect of one count is the same as that charged in another action in respect of a single count, but there are no other libels charged in the same statement of claim, so that the action in one case cannot be said to be for the same or substantially the same libel as in the other. Mr. Nesbitt relied upon *Eddison v. Dalziel*, 9 Times L. R. 334; *Stone v. Press Association Limited*, [1897] 2 Q. B. 159; and *Odgers on Libel and Slander*, 4th ed., p. 578.

These cases, I think, fall far short of supporting the defendants' contention. In the *Eddison* case . . . the libels being the same, the cases were consolidated, notwithstanding the different lines of defence set up by the several defendants. In *Stone v. Press Association Limited* . . . the libel was the same.

In *Odgers*, at p. 578. it is said. "So, too, it is sufficient if the libels be substantially the same, i.e., if they in fact contain the same imputation on the plaintiff, though the language used be different. . . ."

The unreported cases of *Soper v. Star Printing and Publishing Co.* and *Soper v. Globe Printing Co.* were also referred to. Upon examining the statement of claim in the former action and the notice before action in the latter, it was quite evident that the libel charged in each case was substantially the same libel, and Street, J., accordingly made an order for consolidation.

Where there are distinct libels, and one of the libels charged is substantially the same as a libel charged in another action, but the other libel is different, as occurs in a number of the above actions, I do not think there can be consolidation, because the statute, in my opinion, makes no provision for a case of that kind, nor can I see how it can be conveniently worked out. There are, however, a number

of cases where the libel is the same, and for consolidating these. . .

The costs in the cases consolidated in one cause; in the other actions costs to plaintiff.

CLUTE, J.

No

CHAMBERS.

BUTLER v. CITY OF TORONTO

Municipal Corporations—Maintenance—Liability for Negligence of Officers—Employed—Death of Patient—Nonfeasance—Act—Pleading—Statement of Claim—Set out as Disclosing no Reasonable Cause—261—Summary Dismissal of Action

Motion by defendants, under Rule 261, to set aside the statement of claim, on the ground that it discloses no reasonable cause of action, and to dismiss the action.

The action was brought by George Butler, the father of a child, against the city of Toronto, to recover damages for the death of his child, caused, as alleged, by the negligence of the defendants' Isolation Hospital.

F. R. MacKelcan, for defendants.

A. R. Hassard, for plaintiff.

CLUTE, J.:—The statement of claim is as follows:

"2. The defendants maintain, control, and manage the Isolation Hospital in Toronto, which is a public hospital, and they also employ the servants, agents, and medical officers in the said hospital, which is a public hospital, and it likewise is their duty to properly treat all patients placed in said hospital, and in the months of January, February, and March, 1907, the plaintiff's child, going for treatment in the said hospital.

"3. On or about 28th January, 1907, the plaintiff's child, a girl . . . aged 6, was taken ill, and was placed in the said hospital, where she remained for treatment, and, in addition, as was their duty, the defendants agreed with the plaintiff and undertook to properly treat her for diphtheria.

"4. The defendants, through their servants, agents, and nurses in said hospital, did not care for and did not properly treat the child, but negligently . . . permitted her to wander at large through the hospital, and to enter and play in and about a bath-room which was at that time, to the knowledge of defendants, being constantly used by patients with scarlet fever, and the child did so . . . wander at large . . . and did enter and play in and about said bath-room; and the servants, agents, and nurses of defendants negligently allowed . . . the child to go into the downstairs ward where measles were raging, and she did enter into said ward; and in consequence of defendants' said negligence the child contracted the following diseases besides diphtheria, namely, measles, croup, bronchitis, and pneumonia, and died of some or one of them in said hospital on or about 19th April, 1907.

"5. The defendants were guilty of negligence in the premises further as follows: they did not properly guard the child and keep her isolated from contagion from other cases while in said hospital; and they did not keep a physician in said hospital all the time during the first 4 months of 1907; and they did not keep sufficient nurses and attendants . . . as was their proper duty."

It was conceded that the Isolation Hospital in question was conducted under the Public Health Act, R. S. O. 1897 c. 248. Sections 31-38 provide for the appointment of a health officer by the municipality on the request of the Provincial Board of Health. . . .

Sections 56 and 57 provide for the payment of the money required for work and services performed under the Act. Section 104 provides for the erection and maintenance of Isolation Hospitals, which, by sec. 5, are subject to such regulations as may be made by the health officers or boards of health.

Section 93 provides for the isolation of persons infected who have been exposed to infection of any of the infectious diseases covered by the Act. . . .

Section 62 provides that where an action has been brought against the local board of health, or any member of the council or member, officer, or employee of the local board of health of any municipality, who has suffered any damage by reason of any act or default on the part of such local board of health, or any member, officer, or employee thereof, the

municipality may assume the same, and may pay any damages or costs for or employee who may be or has been thereof, but the section does not exempt employee by reason of whose act or negligence caused. . . .

[Reference to Township of Logan v. Village of Dutton, 7 O. R. 664.]

Even if the officers of the board of corporation of the city of Toronto, are considered the servants of the city, they are servants in such a sense that they are responsible for their negligent acts: see Corporations, vol. 2, secs. 974-7.

[Reference to Hesketh v. City of Toronto.]

At most, the offence as charged is not misfeasance, and, in the absence of any action lay by an individual aggrieved by the market Local Board, [1892] A. C. 521. Pictou v. Geldert, [1893] A. C. 521. Council of Sydney v. Bourke, [1898] A. C. 521. Borough of Bathurst v. McPherson, [1898] A. C. 521. Graham v. Commissioners for Queen's Park, 28 O. R. 1.

Applying these cases to the present case, it is my opinion that the officers and servants of the Metropolitan Police are not servants of the city of Toronto in such a sense as to make them liable for their negligence. I am fortified in this opinion even if it were held that the corporation is liable for the acts of those officers and servants, and that the statement of claim charging negligence is not barred.

The only doubt I have entertained of this kind ought to be given effect to, so, consideration of nice questions of law is not necessary. Holmsted & Langton, 3rd ed., p. 46. The rule seems to be fully collected. The rule seems to be that if the plaintiff is satisfied that the plaintiff cannot succeed in his claim should be struck out: South v. Haswell S. and E. Co., [1898] 1 Ch. 1. [1899] 1 Q. B. 455; Law v. Llewellyn, [1899] 1 Q. B. 455; Lawry v. Tuckett-Lawry, 2 O. L. R. 1.

The statement of claim will be struck out, on the ground it discloses no reasonable cause of action, and the action be dismissed, with costs of action and of this application claimed by the defendants.

EDITH, C.J.

NOVEMBER 19TH, 1907.

CHAMBERS.

BROCK v. CRAWFORD.

Pendens—Motion to Vacate—Cause of Action—Pleading—Statement of Claim—Guaranty—Payment into Court.

Appeal by defendants from order of Master in Chambers, 1907, refusing to strike out part of the amended statement of claim and to vacate the registry of a certificate of pendens.

W. N. Tilley, for defendants.

H. Cassels, K.C., for plaintiffs.

EDITH, C.J., dismissed the appeal, but varied the order by reserving the right to move again to vacate the certificate of pendens. Costs in the cause.

ELL, J.

NOVEMBER 19TH, 1907.

TRIAL.

STACEY v. MILLER.

and Misrepresentation—Cheque Signed in Blank and Cashed up for Large Sum—Procurement by Fraud—Unsound Mental Condition of Drawer—Gift—Confidential Fiduciary Relationship.

Application to recover \$5,000. upon the facts set out in the statement.

James McCullough, Stouffville, and J. W. McCullough, Plaintiff.

McKay and C. R. Fitch, Stouffville, for defendant.

RIDDELL, J.:—James Stacey was 85 years of age. On 13th May, 1907, in blank upon the Standard Bank, defendant Frank Miller afterwards presented at the bank. Miller drew \$2,500, and deposited the cheque for \$2,500, and deposited the an account in the bank. A few days May, 1907, James Stacey brought the died on 30th May, leaving a will in Stacey, was named as executrix. The in her name. . . .

It was alleged for the defendant become insane, but this was vigorously and I decided to go on with the trial done, and reserve for the defendant for the enlargement of the trial if it it was necessary for him to be examined appeared that he was not in a condition. At the close of the case, however, counsel agreeing that the whole of the examination Miller for discovery might be read as ant's counsel accepted that in lieu of taken after an enlargement.

Judging of the credibility of the conduct and demeanour in the box, upon evidence as I believe, I find the following

James Stacey, being, as I have said of age, was for some months at least suffering from senile dementia, a form of insanity, there are remissions and exacerbations, or at one hour the patient may be fairly of doing ordinary business, and the next clouded and incapable of understanding what is doing, and sometimes even of making The evidence of the lay witnesses as to conduct of the old man, given, as most of ently any idea of its cogency towards of mental unsoundness, and the evidence called for the defendant Miller, make that this was his condition. And I place the evidence of Dr. Young in the same

Miller was the nephew of Mrs. Stacey great confidence in him. As Mrs. M

ndant, says, the defendant was a sort of confidential ad—
—he was the only man in the family to whom Stacey
look for advice. Miller had borrowed \$1,000 from
y and paid back \$500, leaving \$500 still due, upon
h he was paying interest at 6 per cent. Some little
before 13th May, the old man had come to Miller and
asked Miller to take up his business and look after
Miller had agreed, and then Stacey had consulted him
t giving his (Stacey's) brother Thomas a farm. Miller
panied Stacey to Toronto, and went with him to the
k of British North America, and there attempted to
him to make a present to him of \$1,000. The bank man-
found it impossible to get Stacey to understand what
wanted, and tells us that he found the old man too feeble
understand business, and therefore he refused to have
transfer made to the defendant. About the same time
defendant Miller went to Mr. Robinson, a solicitor who
acted for Stacey in some matters, and told him that
Miller) was thereafter going to do all Stacey's business,
he would employ Mr. Robinson to do the legal work.
er then or at some other time he also stated to Mr.
nson that he was to get \$5,000 from Stacey, and sug-
d that Mr. Robinson ought to receive \$1,000 from Stacey
Mr. Robinson repudiated any right to receive anything
the old man but his costs. About the same time, or
re, the defendant had also, in conversation with Thomas
ey, said that he would get him a farm from his brother
one for him (the defendant); and he boasted of his abil-
to "work" the old man. I have no doubt from what
quently took place that the defendant was intending to
both Mr. Robinson and Thomas Stacey in this way,
they would assist in his fraudulent scheme—which he
already formed.

ome days before the 13th May the wife of the defendant
at the house of Stacey, and asked him to come out and
a mortgage; and on the Wednesday before, Frederick
y, being at Stouffville, saw defendant and was requested
defendant to tell Stacey on Sunday night or Monday
ing to come out on Monday, as he wanted to see him
some mortgaged property. Accordingly, on Monday
May Stacey started for Stouffville, but accompanied
his brother Thomas to look after him. His conduct at
railway station shews that that day was not one of his

good days; and I accept the evidence to what took place and as to the conduct of the brother upon that day. The defendant was in possession of the bank books of Stacey and the amount he had in the bank. Stacey was at the house of the defendant, and there he asked Stacey if he would sign a cheque for him for a small sum, and just wanted it for a few days. Stacey assented, and a blank cheque was produced by him, and a few minutes thereafter the defendant was unable to accept the story of the wife or of her sister or that of the defendant.

Thereafter the defendant tried to get the merchant of the place, to fill in the cheque. Todd refused, and the defendant filled it for \$5,000, himself. Thomas Stacey had no time of his brother's signature to add, and, after the defendant had filled in the cheque, the defendant and his wife also signed as witnesses.

The old man rued what he had done, and dissociated it, and an action was begun, in May. In the meantime Miller had paid the sum of \$5,000 to the defendant, on account, affecting to act as agent for Stacey. This sum Mr. Robinson at once found how it had been obtained. The defendant's solicitor throughout was, so far as appeared, straightforward.

I do not think it necessary to go through the voluminous evidence. At the conclusion of the evidence I intimated what my impressions then were, and I find as facts unless these impressions were changed by the perusal of the evidence. After hearing argument and after reading the findings I now make, and they are the findings in the case of further proceedings.

The defendant alleges that this sum of \$5,000 was given to him by Stacey as a gift. I find that it was not a gift; that the defendant was induced by fraud to sign the blank cheque, it being known that it was for a small sum only, and that at the time of his mental condition he was not able to appreciate the effect of what he did; and that as soon as he could understand what he had done, it was necessary for the proposition that

plaintiff is entitled to a verdict, and that is not conceded.

There is another ground upon which I think the alleged could not stand. The defendant was in a position to be the deceased of a fiduciary character; he had no right to accept a gift from Stacey without making it perfectly clear that he understood and intended the full effect of what he was doing, even if it be, as contended, that it is not necessary that independent legal advice must be shewn to have been had, as to which I need not decide. Nothing in the cases cited: *Trusts and Guarantee Co. v. Hart*, 32 S. C. R. 101, *Empey v. Fick*, ante 144, and *Jarvis v. Jarvis*, ante 831, is in variance with this conclusion.

I am glad that there is nothing in the law to prevent me from saying this wretched fraud.

There will be judgment for the plaintiff declaring that the cheque was obtained by fraud; that the money still in the Standard Bank is the money of the plaintiff; and that the plaintiff is entitled to recover from the defendant the sum of \$5,000, and interest thereon from 14th May, 1907, the plaintiff crediting thereon the amount to be received from the bank; the defendant Miller will also pay the costs of the plaintiff and of his co-defendants.

NOVEMBER 19TH, 1907.

DIVISIONAL COURT.

LAMONT v. WINGER.

Defendant's Plea of Fraud and Misrepresentation—Purchase of Property—False Representations as to Business—Findings on Evidence—Dismissal of Action—Suspicious Circumstances.

Appeal by plaintiffs from judgment of BOYD, C., ante

101. T. Blackstock, K.C., and J. G. Wallace, Woodstock, for plaintiffs.

J. H. Watson, K.C., and A. G. Campbell, Harriston, for defendant.

THE COURT (FALCONBRIDGE, C.J., ANGLIN, J., RIDGWAY, J.), dismissed the appeal with costs.

ANGLIN, J.

WEEKLY COURT

RE COY.

*Will—Construction—Specific Bequest
Predecease of Wife—Residuary
Declaration of Intestacy.*

Summary application by the executor of the will of the deceased, for an order determining and construing the will of the deceased.

D. C. Ross, Strathroy, for the executor,
Coy, Jessie Davidson, Ellen Root, and

F. P. Betts, London, for Roy Luce

H. C. Pope, Strathroy, for Richard

ANGLIN, J.:—The material parts of the will of John Coy are as follows:—

“1. I give, devise, and bequeath unto my wife \$1,000 to be her own absolutely. I bequeath unto my wife the use of the use of the balance of my personal estate of every nature, that I may die possessed of, subject to the following.

“2. I give, devise, and bequeath unto my wife a mortgage of \$1,000 which I now hold with any interest that may be accrued, and I direct the executor to discharge the same as may be after my decease.

“3. I give, devise, and bequeath unto my wife the Union Cemetery—known as Cadboro’—and I direct the executor to improve said grounds.

“4. At my wife’s decease I give, devise, and bequeath unto my daughters Jessie, wife of Thomas Davidson, Abner Root, and Mary, wife of Asa Wainwright, share and share alike, save and except the share of my wife, to give, devise, and bequeath unto my grandson John Coy at my wife’s decease my said grandson

I direct my executor to deposit said sum of \$200 in the Union Bank to his credit, to be paid to him when he attains his majority with any interest that may accrue.

"All the residue of my estate not hereinbefore disposed of I give, devise, and bequeath unto my wife."

The question presented for determination is whether the \$1,000 bequeathed to the wife, who predeceased the testator, passes under the gift of all the real and personal estate of the son and 3 daughters, or whether the intestate died testate as to this sum of \$1,000.

Had there been no lapse of any bequest, undoubtedly there would be no estate upon which the residuary clause in favour of the wife could have operated. The will without this clause, in that event, made a complete disposition of the testator's estate.

It is obvious that, had the wife lived, the provision in favour of the son and the 3 daughters would not have carried any interest in the \$1,000 bequeathed to the wife. Does the circumstance that his wife predeceased the testator have the effect of enlarging the gift in favour of the son and daughters so as to make it include this sum of \$1,000 bequeathed to the wife. The gift of \$1,000 in favour of the wife, in the event of its failing, could not, in any circumstances, be the subject of disposition under the ultimate residuary clause in which the wife herself is named as a legatee.

I do not understand that the effect of the lapse of a legacy is to delete from the will for all purposes the provision containing such legacy. It may well be looked at to determine in construing the instrument as a whole, and to determine what effect should be given to the other provisions which the will contains. Here both the pecuniary legacy of \$1,000 and the general residuary bequest lapse from the same cause. Yet I think both should be taken into consideration in determining the true construction of the paragraph numbered 4.

It is quite apparent that the clauses numbered 2 and 3 are "the following" to which the gift in clause 1 is made subject. To properly appreciate the effect of this it should, I think, be read in this manner: "I give, devise, and bequeath \$1,000 to my wife Sarah absolutely; and, subject to two bequests which I make, of a mortgage of

\$1,000 to my son Richard, and of Cade's cemetery, I give, devise, and for life, the use of all my real estate my personal estate; and at my wife's and bequeath all my real and personal James and my daughters Jessie, Ellen shares, except \$200, which I bequeath Luce. All the residue of my estate unto my wife."

The introductory words of paragraph my wife's decease"—direct attention the will to ascertain what property devolving to its terms, upon the death of the testator for further disposition by the testator. Through the will it is clear that only portions of the personalty of which the testator's life use are in this position; and, although the comprehensive terms "all my real estate" in the paragraph numbered 4, having no introductory words "at my wife's decease," the position in that paragraph may well be, and is, not as "all my real and personal estate" but as "all my real and personal estate bequeathed to my wife for life." When, as I have indicated, the position of the testator's personalty to the sons and daughters follows on the life interest given to the wife, the introduction by the phrase "at my wife's decease" leaves no room to doubt that the testator intended to give to his sons and daughters the remainder in or to the real estate in which he had given his wife a life interest.

The devise for life to the wife, and the devise to the 4 children after the decease, of the same property—all the testator's real estate and personalty—testator, in the bequest of personalty to his 4 children in the gift of personalty to his 4 children with the same property, is further supported by the fact that both the life bequest and the gift to the children are subject to the same deductions, viz., the gift of \$50 to Richard and the gift of \$50 to Cade.

The fact that a general residuary clause is included in this construction.

presence of a subsequent general residuary clause in a will does not suffice to justify the Court in cutting down a disposition contained in the will which is clearly of a different character, and which, upon any view of the whole, is not necessarily so comprehensive that it completely disposes of the entire estate, or of all the property of any one person. *Re Isaac*, [1905] 1 Ch. 427; *Johns v. Wilson*, [1900] 1 Ch. 1. Indeed, a general residuary clause in such a will is not necessary, be deemed to have been added merely "for the sake of greater caution or as a usual form:" *Re Pink*, 4 O. W. R. 718, 7 O. W. R. 772.

The authorities indicate that if there is a later general residuary clause, and the earlier clause, though framed in narrower terms, is sufficiently broad to render it a general residuary clause, it can, upon any admissible construction, be read as extending to particular property, it may be so construed.

See *Re Jull v. Jacobs*, 3 Ch. D. 703; *Smith v. Davis*, 13 Ch. D. 942; *Woolcomb v. Woolcomb*, 3 P. Wms. 112; *Paterson v. Barnard*, 28 W. R. 886; *Easwin v. Appleford*, 5 O. W. R. 56; *In re Jefferson Trusts*, L. R. 2 Eq. 276; *Re Davy*, 11 Ch. D. 949.]

A bequest of the remainder in the personalty (and realty) by bequest—*Jarman*, 5th ed., p. 837 et seq.) to the sons and daughters may, in a certain sense, be regarded as analogous to the gift of a particular residue, i.e., the residue of the personalty or realty in which the widow had been given a life interest. That interest lapsing, upon the death of the testator, the estate in remainder takes immediate effect in the personalty. If the remainder be regarded as a residue, the life interest would fall into it as the particular residue of the personalty out of which such life interest had been given. *Re Trafford v. Tempest*, 21 Beav. 564; *Theobald*, 6th ed. 32.

The \$1,000 given to the wife absolutely had been segregated from the property thus dealt with. Formally, as to that property, the \$1,000 would fall, not into the particular residue of the property in which the wife had been given a life interest, but into the general residue of the personalty.

Notwithstanding the strong leaning of the Courts against the construction of a will which leads to a partial intestacy, it is the proper effect to be given to the several pro-

visions made by this testator, is that above.

An order will, therefore, issue directed to the executor of the estate of the deceased intestate as to the sum of \$1,000. Costs of all parties out of the estate between solicitor and client.

RIDDELL, J.

TRIAL.

MURRAY v. CRAIG

Principal and Agent—Agent's Commission—Property—Negotiations for Purchase of Purchasing Syndicate—No Contract—Subsequent Contract through another Plaintiff.

Action for a commission on the sale of a mine.

J. B. Bartram, for plaintiff.

J. L. Ross, for defendant Crawford.

S. H. Bradford, for defendant B. A.

RIDDELL, J.:—The plaintiff is a resident of Toronto, and in November, 1906, he was examined a mine belonging to the defendant. Some negotiations took place, which had importance in view of what followed. Far as Craig was concerned, the plaintiff was an intending purchaser from and not a vendor. It appears that a common practice in such deals is for a syndicate to buy a mine for a sum, incorporate a company, sell stock in the company, pay for the mine, and take the remainder for their profit. It will be seen that it depends on the price at which the stock can be sold what the profit will be—and that price depends upon the success of the company is floated, as well as (or rather) the intrinsic value of the mine. Another thing for some member of such a syndicate

roker and receive from the vendor a commission upon sale, while the purchase is taken in the name of her or others of the syndicate. The commission apparently sometimes is and sometimes is not divided. Every business has its own methods, and its own code of ethics, and, while the method of proceeding spoken of looks odd at first sight, there is nothing improper in it, if thoroughly understood by all concerned. The defendant Crawford Craig thought that the plaintiff was a purchaser, as I find upon the evidence. If it should turn out that it be held that this is material, the evidence for the action of which I declined to adjourn the trial perhaps might be adduced on affidavit or otherwise. Had I thought it material, I should have allowed the evidence to be put on affidavit, or have adjourned the hearing, as might have been thought advisable.

Nothing, however, came of the negotiations, and, whatever might have been the capacity in which the plaintiff was acting, in electing to act earlier, on 28th November he entered into a contract to purchase, and made a new agreement on 3rd December as a purchaser. These were not carried out. I do not think that Crawford Craig placed in the hands of the plaintiff the Craig property for sale after the other property had been withdrawn—and it must be found that the plaintiff was endeavouring to get up a syndicate to buy the property, perhaps also as well trying to find a purchaser. The owner undoubtedly looked upon the plaintiff as a proposing purchaser, and not as a mere agent, from and after 28th November, 1906. And, no doubt, if the plaintiff had effected a sale either to an outsider or to himself or to a syndicate or partnership, of which he might be a member, the owner would have allowed him a commission. But he did not effect a sale. Morden, one of his quondam associates, got up a syndicate, of which the plaintiff was not a member—and he (Morden) went to the owner and upon inquiry was informed that the Craig property was still in the market and effected a sale or purchase, whichever term may be preferred. This sale was nominally made by Kennedy, but in reality Kennedy, Morden, and Jackson were equally interested—paying \$2,000 and looking to the proceeds of the sale of stock in the company to be formed to pay the purchase price, \$60,000. Morden was the broker and ostensible agent through whom the sale was effected, and therefore he received the

commission, though the vendor thought one of the syndicate himself. The paid, so far as it is due, to Morden. slightest importance (if the fact be) have had his first knowledge of the matter the plaintiff—nor that Kennedy had.

The implied agreement by the vendor to pay a commission to the person who effected the sale, and not merely tried to do so, and which ultimately resulted in a sale. . . .

[Reference to *Marriott v. Brennan*

Cavanagh v. Glendinning, ante 400, giving effect to my view of the law. And my opinion is not shaken by *Bartram* in his very careful and exhaustive judgment.

The action must be dismissed against Crawford Craig with costs.

There is no semblance of evidence against defendant B. A. C. Craig can be held liable. He should succeed against his co-defendant.

BOYD, C.

TRIAL.

BREAULT v. TOWN OF

Highway—Non-repair—Defect in Sidewalk—Pedestrian—Supervision—Notice to Repair—Notice of Accident—Sufficiency of Evidence

Action for damages for injuries sustained by a fall upon a sidewalk alleged to be defective.

BOYD, C.:—I give credit to all testimony to tell the truth, though I think some of it as to details. The evidence is not inconsistent in way in which the accident happened. The person injured and the friend who testified the most accurate, it appears that the plank on which she stepped gave way and caused her thereby to trip and fall. She says that she was going a foot or so

being a narrow footwalk (3 feet wide)—and passed over the plank in question, which was not broken; when she looked back after the fall, she saw that the plank was broken. She described it as a 9 or 10-inch plank and broken about half way across at a place where it would be between the joist sills or joists below. A son of the plaintiff, going to view the spot the same evening, found the plank in place, not loose; he stepped on it, and it went down. He judged that the plank had sprung into place after the plaintiff had stepped on it and before he saw it—so that the break was of such a character as to shew that the plank, though weak as a whole at that point, was not rotten all through. The witnesses, many of them, speak at large with reference to the whole extent of the sidewalk on that side of Sussex street—about 6 feet in all. It was said to be uneven, with boards or joists rotten, and planks loose. I went over the place after the trial, and I found, as the town witnesses said, that the plank was in fairly good repair, with this difference, that the north end (where the accident was) appeared to be in better condition than the south end. It is true that the plank was put down some 17 years ago—with 2-inch pine joists (taken from other streets) and new cedar stringers. I saw no reason to doubt what was said, that the life of the wood, whether cedar or plank, was not run out, and that nails might hold in it for some years more. It was not proved that any planks were loose, in the sense of being out of place merely by their own weight, but some of them were loose in this sense, that in hot dry weather (such as June, when the plaintiff was hurt) the nails had a tendency to draw out to some extent, and so the board might shake a little. These call for attention, and it was said by the town clerk (whose duty it was to look after the board walks) that he was over this walk two days before the accident, and made fast any nails that were out of place. He appears to have made a weekly round for this purpose. No witness said that the plank in question appeared to be loose or out of place before the accident, and no one ever saw a broken plank on the walk before this occasion. Considering the age of the structure, it was in as reasonable repair at this point as could be expected, and was safe for ordinary travel. It was not neglected by the authorities, and it was not considered expedient or necessary to expend more money on it

than was done, as it is soon to be repaved.

I think my judgment may be safely based on the fact that there is no evidence of defective pavement in quo existing so long or so conspicuous as to draw notice of the defect upon the town. The fact that the sidewalk to the walk at large is brought down to the level of the street there is too much vagueness to bring it within the duty of the corporation. The burden of proof has not been satisfied. The evidence was proved in *McGarr v. Town of Port Hope*, 1 O. W. R. 53, 439. More nearly in *McNiroy v. Town of Bracebridge*, 10 O. W. R. 75.

It is not essential to dispose of the question of the sufficiency of the notice. It gives the place (in Sussex street south, in Lindsay) where the personal injuries to the plaintiff occurred (defect in the sidewalk). Perhaps it is sufficient to indicate the particular side of the street where there was a defective plank (as was said in *McQuillan v. Town of St. Mary's*, 1 O. W. R. 382, however, I think that the test suggested in *McInnes v. Township of Egremont*, 5 O. W. R. 382, was satisfied (having regard to the duty of the municipal authorities), that the notice was given with reasonable particularity on the occasion, and the corporation were not negligent.

But I place my judgment on the question of the action: no costs.

TEETZEL, J.

TRIAL.

RUSSELL v. BELL TELEPHONE CO.

Negligence—Injury to Person—Findings of Fact—Charge—Nonsuit

Action for damages for personal injuries to plaintiff, owing to the negligence of

Otto E. Klein, Walkerton, for plaintiff.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton, defendants.

TEETZEL, J.:—At the close of plaintiff's case and of the defendants moved for a nonsuit.

The only question of negligence upon which there was, in my opinion, any evidence to be submitted to the jury was: (1) whether, in the circumstances, the defendants' foreman should have warned the plaintiff of danger from the adjacent electric power line; and (2) whether the foreman told the plaintiff that the power current was not in the line. I instructed the jury that these were the only matters of negligence which were open for their consideration, and the charge was not objected to.

In answer to the first question submitted, the jury found negligence, and in answer to the second question, requiring them to "state fully in what such negligence consisted," they said that "the foreman should insist that the operator should wear gloves in such dangerous places."

By giving this specific answer I think it must be held that the jury refused to find in favour of the plaintiff, and did find in favour of the defendants, in respect of the other two matters mentioned.

The negligence found by the jury was not set up in the statement of claim or particulars, and there was no evidence objected to any such issue.

I must, therefore, give effect to defendants' motion for a nonsuit, and direct the action to be dismissed with costs.

NOVEMBER 22ND, 1907.

DIVISIONAL COURT.

TRETHEWEY v. TRETHEWEY.

Negligence—Motion to Divisional Court for New Trial—Discovery of Fresh Evidence—Examination of Witnesses on Pending Motion—Appointment for—Motion to Set aside—Rules 491, 498.

Appeal by defendant from order of ANGLIN, J., ante reversing order of Master in Chambers, *ib.* and setting

aside an appointment obtained by deferment of witnesses upon a motion, of which the plaintiff had served notice, returnable before a day certain, and set aside the judgment at the trial, and for a new trial.

R. McKay, for defendant.

W. E. Middleton and J. B. Bartram

The judgment of the Court (FALCONER, J., RIDDELL, J.), was delivered by

RIDDELL, J.:— . . . The action was brought on the 20th September, 1907, and resulted in a judgment for the plaintiff. A notice of motion to a new trial was served "for an order setting aside the judgment at the trial . . . and that judgment be set aside, or for a new trial, or for a new order as to the Divisional Court, on the grounds that the said judgment is based on evidence and the weight of evidence is such as to require a new trial, upon the ground that since the plaintiff has discovered material evidence the proposed purchaser was not ready and in a position to carry out the purchase upon the grounds, etc., appearing in the evidence at the trial, and in the evidence to be taken at the trial."

Notice was then given that in support of the motion would be read (amongst other things) the affidavits of J. S. Thompson, H. S. Strathy, E. B. Sammers, and Frank C. Laing, to be taken in support of this motion, the affidavit of W. G. Thompson.

No such affidavit as that last mentioned was filed, but, this notice of motion being served on the 19th October, an appointment was taken out for the examination of J. S. Thompson, H. S. Strathy, E. B. Sammers, and Frank C. Laing, in support of the pending motion, and this was served on the plaintiff on 19th October.

Thereupon a motion was made by the plaintiff's Master in Chambers to set aside the judgment on the ground, amongst others, that the leave

not been obtained. The Master refused the motion, but upon appeal my brother Anglin reversed the decision of the Master, and set aside the appointment. The defendant now appeals.

The defendant's counsel, upon being asked upon the argument before us whether he, in order to succeed in the appeal, must not go so far as to contend that upon serving notice of appeal to the Divisional Court he might examine without leave and of right all the brokers and miners and others in the province in order to strengthen his case in the Divisional Court, stated that he did make such a claim as a matter of right.

What means that the contention is that when a litigant failed in the trial Court, he may when he appeals examine compulsorily every person in Ontario, whether he knows anything about the case or not—and that without an affidavit of the appellant himself or obtaining the leave of the Court or a Judge. This is a most alarming proposition to make—and before we accede to it we must see that it is founded in the statutes or rules. Of course we must respect the legislation as it stands, and not make new law, but we must not state to give full effect thereto without shrinking by the way of what we may think to be an unexpected result. A litigant is entitled to all that the law or practice gives him, but we have no right to dictate to him so long as he keeps within his rights.

Rules governing examinations of this character are set out in the following sequence.

Rule 489 provides that "evidence upon a motion may be taken by affidavit."

Rule 491: "A party to any action or proceeding may require the attendance of a witness to be examined before a Judge or judicial officer having jurisdiction in the county where the witness resides, for the purpose of having his evidence upon oath taken in the action, petition, or other proceeding before the Court or Judge or judicial officer in Chambers."

In the case of Clisdell v. Lovell, 9 O. W. R. 687, 10 O. W. R. 100, it is held that Rule 491 is applicable. As at present advised, I am of the opinion that if this were the Rule applicable to the present matter, the claim of Mr. McKay would be sustained at least on the way to be substantiated. But Rule 498 is the Rule which applies to motions of this kind.

use the affidavit of a person who was a witness on the trial for the purposes of a new trial: "Bompas, Serjeant, arguing in *Edgar v. Knapp*, 7 Jur. 553, at p. 584; Chitty's *Archbold Q. B. Prac.*, 12th ed., p. 1537.

And in many cases it has been laid down that, e.g., the evidence of jurymen as to what took place in the jury room could not be received: *Farquhar v. Robertson*, 13 P. R. 156.

It seems plain that before the change in the practice there was no absolute right to use any affidavit the applicant might desire to use—the application for a new trial is an appeal to the indulgence of the Court, and the Court has and must have full power to hear such material as the Court may think proper—and such material only.

Such, then, having been the state of the law before our Rules, have these Rules made any difference—in other words, has an application for a new trial now has the applicant the right to read any affidavit he sees fit? There is no such provision in the Act or Rules—and the right to read an affidavit must be now the same as before, and no higher. That being so, it must, I think, follow that the right to read an examination must also be given by the Court, and is not *ex arbitrio justitiæ*. And if the absolute right to read such examination does not exist, I cannot think that the absolute right can exist to have such an examination taken.

But I do not think it is necessary to go beyond the wording of the Rules to decide this motion. Rule 498 provides for the case of evidence upon appeals of this kind—and I think thereby the application of Rule 491 is excluded. The Court has given "power to receive further evidence upon questions of fact;" but such evidence is to be "as directed." This, I think, means that before evidence of the kind is to be taken, a direction must be had as to the manner of taking it, and this quite irrespective of any supposed application under sub-sec. (3). Mr. McKay, however, contends that the Rule refers simply to such evidence as is intended to be used in connection with evidence already given, and not such evidence as will be of avail to secure a new trial. There is no such distinction made in the notice of motion; and it would appear that the evidence is desired for general use on the appeal. But, even if it were so limited, I think that such evidence is still "evidence upon questions of fact," within Rule 498.

Then it is contended that this is to establish any fact, but evidence which the endeavour to convince the Divisional Court should be granted. This distinction and the evidence is still "evidence upon the facts."

There have been, so far as I know, no cases in Ontario upon this point.

Kendry v. Stratton (10th June, 1891). In this case a verdict was given for the plaintiff. Upon motion for a new trial upon the ground that it had not been proved that documents had been delivered, the Divisional Court appointed to examine a witness the defendant's motion. Mr. Winchester set this aside, on the ground that no other evidence had been had except after a direction by the Divisional Court. The Divisional Court came on for the defendants mentioned the Divisional Court, and asked to be allowed to examine the witness, and for an enlargement of the trial. The Divisional Court (Armour, C.J., Falconbridge, J.) expressed an opinion that the appointment was set aside, and declined to grant the motion.

The matter came up again in *Rushton v. R. W. Co.*, 6 O. L. R. 425, 2 O. W. R. 100. The Master had referred a similar question to the Divisional Court, and it came on before my Lord. *Kendry v. Stratton* was cited, and it does not seem to have been considered him. The Master has done in that case, and he says (p. 426) that in a proper case the evidence may be taken under Rule 491. My Lord expressed this opinion, and the opinion itself is to be observed that the appointment was shewing that it is not *ex debito justitiae*. If the test that I have suggested in *Rushton v. Grand Trunk R. W. Co.* should be applied, however that may be, the *Rushton* case is what is contended.

The appeal should be dismissed with costs.

It may be that on a proper case the Divisional Court may give a direction that the evidence be taken under Rule 491.—with that we have nothing to do.

RIDDELL, J.

NOVEMBER 23RD, 1907.

TRIAL.

BENOR v. CANADIAN MAIL ORDER CO.

Company—Managing Director—Salary—By-law of Board of Directors—Approval by Shareholders—Money Expended for Company—Action by Assignee—Addition of Assignor as Plaintiff—Set-off—Misrepresentations—Payment for Stock Allotted to Managing Director for Services—Voluntary Winding-up.

Action by the brother and assignee of one J. T. Benor for salary alleged to have been earned by the latter as managing director of the defendant company, and for cash paid by him on account of the company.

R. W. Eyre, for plaintiff.

W. Proudfoot, K.C., and W. H. Grant, for defendants.

RIDDELL, J.:—One J. T. Benor . . . took up the management of the mail order business, examined into it theoretically for some time, and went to Chicago and was allowed to travel through the various departments of a large mail order concern in that city. . . . On 11th May, 1905, Benor and one Crawford entered into an agreement with the Industrials Agency Limited, an incorporated company carrying on the business of procuring the incorporation of joint stock companies. The substance of this agreement was that the Industrials Agency were to procure the incorporation of a joint stock company under the Ontario Companies Act, by the name of "Canadian Mail Order Limited," or some similar name; Benor and his associate, at their own expense, to advertise the preference stock of the new company, and devote all their time to selling it. The Industrials Agency were to devote part of their time, and out of the first instalment paid upon all stock sold, except that allotted to the directors of the company, the Industrials Agency were to receive 12½ per cent. in cash. This was afterwards somewhat modified. . . .

The Industrials Agency at once sent persons to incorporate the company and Benor assisted, so far at least as to become a director. Men of the highest standing were induced to form the company and become directors. None of these, it is sworn, paid anything, if not all, was obtained a promise to purchase 10 shares of the preference stock of the company in addition of obtaining 2,500 shares of the common stock and becoming a permanent director of the company at incorporation. I think the fair inference from the evidence is that it never was intended that the directors should pay anything, but that they were to receive common stock for becoming directors of the new company an appearance of solidity and respectability beyond question that Benor took advantage of these directors in selling the stock.

A charter was granted under the Companies Act on 21st June, 1905. Benor was not a director for this charter, and, while he had no authority to sell stock, this was not acted upon. No subscription for stock, this was not acted upon. It was done before the application to the Registrar for a charter which was acceded to had been drawn up. It was found that this document (exhibit 8) was not a subscription for the name of the proposed company, but a subscription for stock that it is not a subscription for stock. The document was abandoned—it should have been rejected. It was abandoned, and should not have been acted upon or his assignee in this action. . . .

The provisional directors met on 21st June, 1905, at 5 p.m.; appointed Mr. S. president and Mr. B. secretary; passed a set of by-laws which had been prepared by Mr. S. and passed a resolution which will be referred to later. On July, at 10.30 a.m., a meeting of the shareholders of the company was holden; all the shareholders were present. This meeting confirmed what had been done by the provisional directors, and elected all the directors (Benor), except one H., directors. The meeting passed "that the directors be and are authorized and empowered to take such steps as may be necessary to dispose of the remaining shares of the company stock on such terms and conditions as they may think fit."

11 a.m. of the same day the directors met, organized the permanent board, and passed, amongst others, the following resolutions: "that James T. Benor be elected managing director of the company;" and "that the salary of the managing director and the secretary-treasurer until the company is in operation be fixed at \$150 each per month."

Neither of these resolutions was ever confirmed at a general meeting of the company, and indeed no general meeting of the company was ever held thereafter. But on 5th July the following document was signed by all the shareholders: "We, the undersigned, being all the shareholders of Canada Mail Order Limited, hereby confirm the minutes of the shareholders' meeting of the company held . . . on the 4th day of July, 1905."

At the first meeting of the permanent directors it was resolved that Benor should devote his time for the present to selling the preference stock of the company (with a bonus on the common stock), and, as the money to be paid in on the stock sold was to be placed at once in the bank, it was resolved that Benor should advance money for expenses such as commissions, etc., on such sale in the meantime. He had no money of his own, and accordingly borrowed largely from his brother, the plaintiff, for that purpose. Benor undoubtedly made every effort to effect sales, and used effectively the names of the directors in doing so. He is charged with making misrepresentations in his endeavours to effect sales. I do not find that to be the case. But, as it may be of some material to consider this in actions brought by others, my judgment will be without prejudice to any action that any one alleging himself to be deceived may have against Benor. In such actions further evidence may, perhaps, be adduced. . . .

Many applications for stock were received, and shares were allotted to those subscribing. I find as a fact that Benor did not subscribe for stock in the company, but that he did act as director. By-law No. 13, drawn up by him or approved with his cognizance and approval, provides that "any shareholder who holds 100 fully paid up shares may be elected a director." At the meeting of the provisional directors a resolution was passed reciting that Benor had expended time and money in gathering information, that he had

offered to "supply and transfer to information and data and the benefit in consideration of the receipt of 25,000 assessable shares of the 2nd preference paid and non-assessable shares of the company." The resolution then goes on to offer of Mr. J. T. Benor be accepted 25,000 fully paid and non-assessable preference stock and 25,000 fully paid and of the common stock be forthwith all to Benor." The president and secretary execute the certificates of 2nd preference stock to Benor accordingly. All this, was before the attempted confirmation already spoken of. A stock certificate of fully paid up common stock was executed and secretary on 23rd September, but detached from the book. However, Benor have accepted the stock, as we find from time to time of common stock, and offer of 1,000 shares of 2nd preference 7 gentlemen (shareholders), except certificate for the 25,000 shares of this executed at the same time as the certificate stock, and also remaining in the book transfers of this stock seem to have been

Benor went on selling stock from paying commissions, etc., for services pany. The company never in fact entered business for which it was incorporated; find that thereby the company suffered given or offered to shew that had they engaged in business, they would either have made money or would not have been are. Every one connected with the company lost heart, and finally it was put into having borrowed money from his brother signed to him his claim. At the time ignorant of any existing or possible claim against Benor. When I have added that he did not act treacherously or improperly I think all the facts appear upon which

The action is twofold: (1) for the salary to which Benor was entitled; (2) for cash paid by Benor on account of the company. . . .

Had it not been for the decision of the late Mr. Justice in *Re Ontario Express and Transportation Co.*, The *Directors' Case*, 25 O. R. 587, I should have thought that a director by being called or appointed "managing director" was not better his position, but that he remained as regards remuneration in the same position as an ordinary director. That decision I do not find overruled or questioned, and must follow it—coming, as it does, after and with a full consideration of the effect of *Livingstone's Case*, 14 O. R. 16 A. R. 397.

As to the claim that the board who appointed Benor managing director and fixed his salary were not duly elected, the members thereof were not duly qualified, I do not make this objection open to the company. Five of these were shareholders by the charter, and these 5 would be a quorum—these 5 indeed were the board by the charter, and continued unless the election of the 7 was legal.

The second claim is, I think, free from difficulty. The money expended by Benor was expended for the company, certainly under the bona fide belief that he was doing so under the authority of the company lawfully given. The company have had the full advantage of the expenditure, and it would be monstrous to hold that the money should be repaid.

Then as to the claim for set-off—it will be necessary to set out certain further facts to dispose of this claim.

Benor having assigned all his claim against the company to the original plaintiff on 21st September, 1906, the assignee cannot serve notice of the assignment upon the company, and immediately and upon the same day he issued the writ in this action.

An application was made under the Ontario Winding-up Act, R. S. O. 1897 ch. 222, to the County Court of York, and on 11th October, 1906, an order was made for winding-up, also appointing a liquidator. An order seems to have been made in the County Court on 18th April, 1907, but that has been disregarded, as it is superseded by another of 1st May 1907. This order provides that the action may proceed,

and that the action and all proceed same plight and condition as they winding-up order—and the liquidator to the action.

It does not appear that any order sec. 23 (2) or sec. 33 of the Act; and of the reason for the order of 1st March present action proceeded as an ordinary company. No reference to the winding in the statement of defence, and the action was conducted without reference to the fact that there had been a winding-up procedurally, and it was at my request that the order was put in. This is not a proceeding under the Act, and the rights of the plaintiff must be determined as they were at the time of the issue of the order.

There are two grounds of set-off. First, that the assignor misrepresented that he was receiving and had received cash he had put in or was going to put in, in favour of the evidence of Benor's findings at the trial may be looked upon as a misrepresentation in the proceedings. But, even if there were no misrepresentation by Benor, they were not made to the company, but to persons whom Benor was desiring to get interested in the company, and, if any set-off was fitted by the alleged misrepresentation, it would shew that if Benor had put in the company beginning business would have been much more profitable and would not rather have been much more of a loss.

Then it is said that Benor should have received under the resolution of 3rd March meeting of the company held on 4th March, 1904, when all the shareholders of the company and all the provisional directors were present at the meeting. And remembering that of the stock of the company, \$500,000 was paid up, and that the dividends were to be paid annually, in priority to all else, and that the assets were to be distributed in priority to the stock and unpaid dividends—and that

5,000 second preference stock, with the same privileges, subject to the first preference stock—and that the common stock was only to share pro rata in the remainder of the profits and assets with the first and second preference stock—I am not inclined to say that the common stock was worth anything. That seems to have been the view of those interested in the company, as it was given away lavishly as a bonus to those who would buy first preference stock. And as to the second preference stock, I think that it was worth very little indeed, if anything. Now it was \$25,000 of the second preference and \$25,000 of the common stock. . . . that Benor was getting for all his knowledge (I am not forgetting his small salary) and for the benefit of his labours. No fraud can be found in this transaction, and I do not think that the company can now lay upon Benor to pay for that which he took only in payment for some benefits he was conferring on the company. I am not deciding what would be the result if this were a proceeding under the Winding-up Act to make Benor a contributory. In the view I have taken, it is not necessary to decide whether either of these claims, if established, could be set off against the plaintiff, who honestly took the assignment of Benor's claim without any notice or knowledge of the alleged set-off, or facts which might justify any such claim.

There will be judgment for the plaintiff for the sum of \$1,800, and interest from the date of the writ, also for the remainder of the amount sued for, with interest from the same date, unless the defendants shall on or before 3rd December elect to take a reference as to the amount (excluding \$1,800 and interest, which is not to be referred). In the case of a reference the Master will find and report the amount of money, with dates and items, expended by Benor or on behalf of the company, including personal disbursements and the like—reserving to myself further directions and subsequent costs, if a reference be had. The defendants shall pay the costs up to and including this judgment. . . .

Having, upon his written consent filed, added J. T. Benor as a party plaintiff ab initio, I need not consider the troublesome question as to the effect of an assignment without notice to the debtor.

DIVISIONAL COURT

COLE v. CANADIAN FIRE

Stay of Proceedings—Fire Insurance Arbitration Act, sec. 6—Waiver by Applying.

Appeal by plaintiffs from order of staying an action upon a policy of fire insurance.

G. C. Gibbons, K.C., and C. A. Macdonald, for plaintiffs.
W. H. Hunter, for defendants.

The judgment of the Court (ANGLIN, J., RIDDELL, J.), was delivered as follows:

RIDDELL, J.:—The plaintiffs were insured under a policy which, for the purpose of the Act, may be considered as containing the usual conditions only. A fire took place on 15th April 1905, and that as to a certain part of the loss the plaintiffs had. For some reason, not of any legal character, the insurers and insured did not agree as to the amount destroyed, and proofs of loss were deferred. Some skirmishing took place in respect of the amount claimed, but no conclusion was reached. On the expiration of the 60 days (7th July) the plaintiffs served. On 26th July a formal demand was served by the defendants, but no further action was taken until the service of the statement of defence in September. The defendants delivered a statement in which they deny the damage by fire, and claim the damage, and the proportion payable by the plaintiffs, on the adjustment of the part and proof of the remainder, as well as the lapse of time. The plaintiffs then plead specially the refusal of the defendants to pay with the appraisal, the demand for the amount, the right of the plaintiffs to appoint an arbitrator, and by saying that "they have been at all times ready and willing to pay and are still ready and willing

policy, the true amount of their liability under the policy, and that it is owing to the conduct of the plaintiffs in not proceeding first with the appraisal aforesaid, and the second place in not proceeding with the arbitration aforesaid, that the said loss has not been paid;" and they say that this action should not be proceeded with until after the said arbitration has been had." Issue was joined on 17th September, and notice of trial given for the imminent jury sittings to be held on 8th October at London.

A motion was made on behalf of defendants on 25th September before Meredith, C.J., to stay the action; and before him all defences . . . were withdrawn, and it was represented that the whole matter in dispute was the amount of the loss. The Chief Justice made an order staying all proceedings until further order of the Court.

Upon the appeal before us two grounds were relied upon. First, that by the effect of clause 17 of the statutory conditions the cause of action had accrued before demand for arbitration, and the action being properly brought should not be stayed. Upon principle it is impossible to give effect to a contention, and if authority were needed it is supplied by *Hughes v. London Assurance Co.*, 4 O. R. 293.

The other objection is more formidable, based as it is on sec. 6 of the Arbitration Act, R. S. O. 1897 ch. 62. Insurers insured under a policy containing or subject to clause 16 of the statutory conditions have been held to come within the words "any party to a submission" in this section and its predecessors: *Hughes v. Hand-in-Hand Ins. Co.*, 7 O. R. 34, and other similar cases. The power given the Court to stay proceedings under this sec. 6 of R. S. O. ch. 62 is upon application after appearance and before pleading or any other step in the proceedings. An application after delivery of a statement of defence, as in this case, must be refused: *London Ins. Co. v. Abbott*, 29 W. R. 584. And the ground so much relied upon by counsel for the defendants, upon which the motion was made, does not support his contention.

In *Hughes v. London Assurance Co.*, 4 O. R. 293, *Hughes v. Hand-in-Hand Ins. Co.* 3 C. L. T. 600, 4 C. L. T. 34, a writ of habeas corpus was entered on 2nd November, 1883, and upon the same day notice of motion was served returnable 5th November. It will be seen that the insurance companies . . . brought themselves within the provision of what was then substituted at that time what is now sec. 6 of the Arbitration

Act, and were in a different position
fendants here.

The fact that the right to arbitration does not make that right, when if it had been obtained by private opinion that the application is too late.

There is no hardship in so holding made against the insurance company days from the delivery of the proofs ample time to allow to an insurer whether they desire to contest the amount the accruing of the cause of action they have some 18 days before the claim is due. During this time an applicant a stay; and if the defendants, instead choose to put in a pleading, they must that method of having their rights waived the provision for arbitration to stay (if made at the right time) the order staying the action generally, instead that of amount, or staying the action the amount, if there were other statutory provision for staying an action the Ontario Judicature Act, sec. 51 reserves to the Court all its former powers a case within such powers.

Appeal allowed with costs in this

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, C. NOVEMBER 25TH, 1907.

WEEKLY COURT.

CHAMBERS v. WINCHESTER.

Municipal Corporations—Investigation of Conduct of Municipal Officer—County Court Judge Appointed by Council Conduct Inquiry—Powers of Commissioner—Municipal Act, 3 Edw. VII. ch. 19. sec. 324—Scope and Method of Inquiry—Proceedings Open to Public—Examination of Witnesses and Parties—Discretion of Commissioner—Removal of Commissioner—Alleged Bias—Ex Parte Proceedings—Jurisdiction of High Court—Statement of Officer Accused of Misconduct as Plaintiff in Action.

Application by plaintiff for an interim injunction to restrain defendant (the Judge of the County Court of York), as designated, from investigating certain charges against him as park commissioner for the city of Toronto, and from calling or hearing evidence of any witnesses in connection with the investigation who had previously attended under oath before defendant, and been examined by defendant in camera, and from referring to or adducing in evidence and allowing the same to be used in evidence against him, etc., and to remove defendant from the conduct of the investigation as commissioner, and for the appointment by the Court of an unbiassed, impartial commissioner in place of defendant, on the ground that the defendant could not conduct an investigation in a judicial spirit, as required by the Municipal Act.

For plaintiff, Robinette, K.C., and W. W. Vickers, for plaintiff.

For defendant, Fullerton, K.C., and W. E. Raney, for defendant.

BOYD, C.:—A resolution has been passed by the council under sec. 324 of the Municipal Act, ch. 19 (O.), requesting the Judge of the County Court to investigate certain charges alleged of misconduct on the part of the city commissioner. The Judge has entered upon the inquiry, and has appointed a section, clothed with all the powers of a statutory commissioner under the Municipal Act, ch. 19, providing for inquiries into public accounts, &c., ch. 19. Among other things, he has the power to examine before him any party or witness under oath, calling for the production of such documents as he may deem requisite to the full investigation of the matters of inquiry. In these regards, the Judge has the power as is vested in any Court: see *Edw. VII. ch. 10, sec. 7*. An injunction was granted upon a writ issued in the High Court, restraining the County Court Judge as such commissioner from conducting an inquiry in a private manner, with closed doors, and from proceeding first to examine the witnesses, the commissioner, who is the plaintiff in the inquiry, to conduct the inquiry.

An opinion being expressed by the Judge at an earlier stage of the action, that the inquiry should be conducted in public, I understand that the County Court Judge has expressed his willingness to adopt that method of procedure, so that no objection was said on that branch of the motion, except that in a matter of public interest such a procedure is alleged, it is expedient to have it conducted as in open court. The procedure of the County Court is recognized as the normal method of conducting inquiries, and parties, though I do not say but that the commissioner will exercise a wise discretion in examining witnesses (while one is being examined) in private, in the general public when the disclosures are of a confidential nature. But evidence should not be taken from the person chiefly interested. The principle of the ordering of business is that the commissioner has the absolute power of regulating the proceedings, subject to the so long as he keeps within his jurisdiction. See *Municipal Government, 2nd ed., vol. 2*.

That consideration as to the wide discretionary power of the commissioner suffices to answer the objection now raised, that the party whose conduct as a public officer is under investigation should not be first called. That is a matter entirely for the commissioner, who will rule upon the questions and direct the course and scope of the examination. He is not to be under the supervision of any Court as to his manner of getting at such legal and permissible evidence as he may deem requisite for a full investigation. He is appointed for that purpose, and I know of no authority, nor is any cited, to restrain him from discharging that duty within the bounds of his commission.

The authorities are the other way: the last is *Lane v. City of Toronto*, 7 O. L. R. 423, 3 O. W. R. 269, where Mr. Justice Britton refused to interfere by injunction with the conduct of an inquiry such as this in regard to the admission or rejection of evidence or the examination of witnesses. The same effect is in *re Godson and City of Toronto*, 16 O. R. 452, which was affirmed by the Supreme Court, 18 S. C. R. 36, where the Court was asked to intervene by way of prohibition, but the reasoning of the Court (particularly in the judgment of Hagarty, C.J.O.), applies with equal force to relief by way of injunction.

Lastly, the Court is asked to remove the County Court Judge and appoint an "unbiassed, impartial commissioner." The Judge (now made defendant) cannot now make the investigation "in a judicial spirit." The status of the County Court Judge in the discharge of these functions is defined in *re Godson and City of Toronto*. His duties are, to receive the evidence, and to return the evidence, with a report of the result of his inquiries, to the council by whose action he is appointed. His report may supply information and material upon which the council may decide to take action, and any such action is wholly within their discretion. He has no power to pronounce judgment imposing liability on any body; he merely makes preliminary inquiries, gathering them together and presenting in compact form such information as will enable the council to deal with the whole matter as they shall be advised. All he has to do as the outcome of his commission is to report to the council the result of the inquiry and the evidence taken thereon. It is the evidence upon which governs, and that speaks for itself. The com-

missioner tries nothing, and decide judicial officer.

The affidavit of the plaintiff commissioner having asked for complaints received letters relating to the parks suggestions of improper motives and part of the commissioner. Nothing of bias and inference or conjecture in the result of the investigation, affidavit.

Now, regard what the commissioner upon this and like investigations with in any culpable sense.

It is not beyond the competence of self to initiate proceedings to produce documents which are likely to further is it beyond his competence to invite sent in by persons who are willing it is also within his powers, though course, to confer with possible witnesses of ascertaining what they knew and while to have them duly subpoenaed affidavits are not procured from commissioner may take (or preferably direct in the way of collecting evidence a case of solicitors preparing for trial communications do not become evidence speaks openly under the sanction liability to be forthwith cross-examined information has been or may be obtained that the commissioner will act upon it in his report; much less can I assume it is actuated by any partizan spirit, however to gain light from every available source giving permanent shape to all the relevant

I deprecate the making of affidavits on the integrity of an officer designated by the municipality as statutory accepted by the municipality as statutory such slender grounds as are here alleged serious kind are easy to frame upon "but they should not be listened to for the function of the commissioner is merely to collect materials for the subsequent consideration

council. The commissioner is not, *pro hac vice*, a judicial person—he decides nothing affecting the legal rights of plaintiff, and he is not, therefore, within the ambit of official, quasi-judicial, or administrative officers, who become disqualified by interest or bias: *Regina v. London*, 71 T. 638.

Even were a plain case clearly established of unfair dealing, that would not, in my opinion, suffice to attract the jurisdiction of this Court. By analogy to proceedings in the case of a royal commission (as distinguished from a statutory commission), the application for redress, where, for any sufficient reason, the commissioner becomes unworthy of confidence, should be directed to the appointing power—which in this instance is the municipal council. That body may, if it sees, in a proper case, suspend or dissolve the resolution under which the present commissioner acts. See *Todd's Parliamentary Government*, 2nd ed., vol. 2, p. 441.

I refuse the application for an injunction with costs. I have a very strong opinion that the plaintiff has no locus standi, because the Court is without jurisdiction, but upon an interlocutory application I do not dismiss the action.

LABEE, J.

NOVEMBER 25TH, 1907.

TRIAL.

GORMLEY v. BROPHY CAINS LIMITED.

Chattel Mortgage—Seizure under—Action by Mortgagor for Conversion and Trespass—Sale of Mortgaged Goods—Business Continued as Going Concern—Payment of Rent to Save Distress—Statement of Demand and Costs—R. v. O. 1897 ch. 75, sec. 15—Account—Interest—Costs.

Action by Olive Adelaide Gormley, trading under the name of Gormley & Co., against the defendants, for recovery of damages for alleged wrongful and illegal conversion of goods and chattels, “for illegal and improper dealings,” and for trespass to goods, lands, and property. H. H. Watson, K.C., and R. J. Slattery, Arnprior, for plaintiffs.

Hamilton Cassels, K.C., for defendants.

LABEE, J.:—On 6th February, 1906, the plaintiff gave defendants a chattel mortgage as collateral security for

certain promissory notes amounting to the further indebtedness of \$1,000, the price for the sum of \$8,988.15, which, by agreement, was to be paid on 18th July, 1905, upon the mortgage, and it was duly renewed under the Act. The stock of the mortgagor's stock in trade, consisting of dry goods, ready made clothing, leums, hats, caps, furs, as well as all "all goods, chattels, stock in trade, and description whatsoever which may be during the currency of these premises the store or premises now occupied by the east side of John street, in the town of Gormley's Up-to-date Dry Goods Store, was managed entirely by the plaintiff, Gormley, who acted under a general assignment dated 6th February, 1905.

The complaint of the plaintiff assigns is that on 18th March, 1907, the defendants gave no warning to the plaintiff, "and did not follow the usual course provided in such cases, but did take possession of all the general stock of the plaintiff, consisting of clothing, millinery, carpets, linoleum, fixtures and stock in trade of the plaintiff, and retained possession of the same, and did not give up the said business of the plaintiffs in the usual way and selling, and have made no attempt to do so in any way under the chattel mortgage; that the defendants did not advertise the goods for sale under the mortgage; that the defendants brought new goods into the store, and that they marked goods far below the value of the stock by selling it at figures far below the price, and by not advertising and selling the goods; that the defendants made no list of the goods seized; that they made no demand upon the plaintiff for the moneys due under the mortgage, "and did not give the plaintiff any memorandum or paper of the time of or before or after the writ of seizure and conversion;" and that the defendants did not give possession of the plaintiff's store to the plaintiff, and thereof against the plaintiff. A claim for the sum of \$8,988.15, with interest thereon, is also made.

the pleadings that the mortgage was void for non-compliance with the Act, but this was abandoned at the trial.

The letters from defendants to the plaintiff covering the period from 6th September, 1906, to 1st February, 1907, show that the plaintiff's account was getting in an unsatisfactory condition: the defendants were continually complaining of the smallness of remittances, and insisting upon being paid all the receipts from the store except regular expenses management.

On 1st February, 1906, the plaintiff, from a statement appearing in the stock book at p. 17, owed the defendants \$8,988.15, and outside accounts \$2,498.15; at p. 21 of the stock book it appeared that in February, 1907, the liability to the defendants was \$12,076.62, and outside accounts \$754.79.

In the beginning of March, 1907, Thomas J. Gormley went to Montreal to see the defendants regarding the liability, and I find upon the evidence that the following arrangement was made. Thomas S. Church, an employee of the defendants, was, with the consent and approval of Gormley, set up with him to take charge of the business as manager for the defendants; the stock was to be reduced by specially advertised sales at reduced prices; and Church was to remit the proceeds to defendants in reduction of their liability. Church at once prepared advertisements for the local papers, and issued and published posters; these were prepared with the approval and assistance of Gormley; some of the statements in the first advertisement were the following: "Cash King. Clean Sweep Sale. We want \$10,000 by April 1st. Clean Sweep Sale of Everything Regardless of Cost. On Monday Morning at 8 o'clock The Knife Will Go Deep into Everything." In the posters Church is described as manager. The advertisements were in the name of Gormley & Company. Some \$2,000 of cash was taken in for goods sold between 8th and 18th March, and this was sent daily to the defendants on account of their claim.

On 18th March a warrant was issued by the defendants to Thomas S. Church, authorizing him to seize under the chattel mortgage for \$8,988.15. Thomas J. Gormley knew of the intention to issue this warrant, he having been advised by letter from the defendants, which he received on the morning of the 18th. Church demanded and received the keys from

Gormley, the latter having been assisted to the 18th.

On the 19th Mr. Brophy, the president of the company, went up to Arnprior, saw him to work in the store at \$75 per week; he was engaged for 3, 4, or 5 months; Church in carrying on the business was discharged, having been paid \$700 in wages; then some 10 days or 2 weeks after the complaints were first made upon behalf of the proceedings taken by the defendants when Gormley was engaged, Mr. Brophy offered \$1,000 off defendants' claim if Gormley would do so, but he was unable to do so.

I find that Gormley was a consenting party to that was done down to the time of his departure, as inferences can be drawn from the evidence that Gormley must have known of all the proceedings being done, and she made no objection to the band's dismissal. This action was taken in May, and on the same day an ex parte order was obtained at Pembroke, restraining the defendants from the sales of the goods covered by the chattel mortgage in June. The motion was enlarged from the injunction continued, until 27th June, and was made for the sale of the goods of Suckling & Co., and the proceeds therefrom were paid into Court; the sale took place on 27th June, and the Court \$4,576.74.

I find that at the date of the seizure the mortgage was overdue, and the defendants refused to give up and take possession, and as to the conduct of the defendants did "not follow the usual course of departure from the course usually followed by the plaintiff, and the object in continuing the mortgage was to reduce the liability of the plaintiff an opportunity of taking it back was reduced and there was found to be no stock. The goods were not advertised because it was thought more could be obtained for the name of Gormley & Co., and this was to the profit and credit. The stock was short in

the shipment of new goods by the defendants was solely to fill up the short lines and assist in disposing of the old stock; it was for the benefit of the plaintiffs as much as the defendants, and was done with the consent of Gormley, and a month he assisted in making sales from the new stock as well as the old. I find that there were no goods unduly sacrificed; many articles were sold at greatly reduced prices, a good deal of the stock was old and in bad condition; I think good judgment was used in making the sales, that much more was realized than would have been obtained by selling in any other way.

The plaintiff was lessee of the store premises, and ordinarily of course the mortgagees would not have been entitled to continue the business in those premises to the exclusion of the plaintiff, and would have been bound to remove the goods, but I find that at the time of the seizure the rent was \$240 in arrear, and on 22nd March demand was made on the defendants by the landlord for payment of this \$240, and an additional quarter's rent of \$90, and the defendants paid \$330 rent to the landlord; this was done to enable them to carry on the business for the benefit of the plaintiff. It does not appear that the plaintiff or Thomas Gormley actually knew of the payment of rent, but they must have known it was in arrear and that the defendants would have to pay it to save the goods from distress for rent. The taxes for the year 1906 were unpaid; that was a liability of Gormley & Co., and was paid by the defendants.

Complaint was made that the defendants had not complied with R. S. O. 1897 ch. 75, sec. 15, requiring a statement in writing to be given of the demand and of the charges incurred in respect of the seizure and subsequent proceedings. I do not think the plaintiff can obtain any redress for this, for two reasons. First, the arrangement made as to the mode of selling and realizing upon the goods prevented any charges for seizure upon the basis of the scale of charges referred to in sec. 4 of the Act, which would be the same charges referred to in sec. 15. And, in the second place, the "subsequent proceedings" had not been terminated when the action was brought, and the time had not then arrived for delivering such statement, had it otherwise been necessary to deliver one at all.

When the goods were seized on 18th March Church engaged all the staff in the store to continue the business, and

their salaries, as was Thomas J. Gormley, were paid out of the money, with the intention of making any charges for services, and the other arrangement having been made, the plaintiff cannot now complain.

I accept the statement of the defendant's necessities when in conflict with the plaintiff's Gormley.

It was urged at the trial that a judgment for an account, and Rennie v. Block, 26 O.R. 481, upon. I do not think the plaintiff is entitled to an account. The action is not for an account, and no such claim is made.

It appears that on 18th March, 1907, upon the mortgage \$9,287.33, and the balance due by the defendants from sales is \$4,311.40, the mortgage \$4,911.40, to which must be added taxes paid, making the mortgage debt interest, \$5,344.93, upon account of which the plaintiff claims \$4,576.74.

In the view I take of the case, the plaintiff must be dismissed with costs, and the balance due together with interest thereon, be paid to the plaintiff.

MARBLE, J.

TRIAL.

UNIVERSAL SKIRT MANUFACTURING CO. v. GORMLEY.

Chattel Mortgage—Action by Creditors—Mortgage and Void—Failure of Proof of Interest—Defect in Chattel Mortgage—Assignment—Renewal—President of Incorporated Company—Authority from Directors—Mortgage Act and Amendments—Excess—Inventory—Waiver by Assignment of Plaintiffs per se—Name of Assignee—Right of Assignment of Mortgage.

Action (begun 20th June, 1907, by the holders of past due promissory notes).

endant Olive A. Gormley, trading under the firm name of Gormley & Co., amounting with interest to \$330.29, to recover that amount against the defendant Gormley, and as against that defendant and defendants Brophy Cains Limited for a declaration that a certain chattel mortgage given by the former to the latter, dated 6th February, 1906, covering the goods, chattels, and stock in trade of defendant Gormley, and a certain renewal thereof, filed on 23rd January, 1907, were fraudulent and void, and for an account by Brophy Cains Limited of all moneys received by them from the sale of the goods covered by the mortgage.

G. H. Watson, K.C., and R. J. Slattery, Arnprior, for plaintiff.

H. Cassels, K.C., for defendants Brophy Cains Limited.

No one for defendant Gormley.

MABEE, J.:—The grounds alleged for the attack upon the mortgage are that on and prior to 6th February, 1906, Olive A. Gormley, trading as Gormley & Co., was unable to pay her debts in full, and was insolvent, to the knowledge of Brophy Cains Limited, and that the chattel mortgage and renewal were made for the purpose of defeating, defrauding, hindering, and delaying the plaintiffs and the other creditors of Olive A. Gormley. A further ground is alleged, that the chattel mortgage and renewal do not comply with S. O. 1897 ch. 148 and amending Acts. The statement of claim further alleges that on 18th March, 1907, the defendants Brophy Cains Limited seized and sold the goods covered by their mortgage, at slaughter prices; that the seizure was illegal and excessive; and that no inventory or memorandum was served upon the mortgagor by the defendants Brophy Cains Limited or their bailiff.

On 13th August, 1907, the Universal Skirt Co. made an assignment for the benefit of their creditors to James Glanville, and on 12th September, 1907, an order was made, upon the application of Glanville . . . adding him as party plaintiff, and allowing the action to proceed; a copy of this order was served upon the defendants, and no appeal was taken therefrom.

No defence is made upon behalf of Olive A. Gormley, and, the plaintiffs having proved the overdue notes, judgment may go against her for the amount thereof, with interest, and costs upon the scale of the County Court.

Brophy Cains Limited continued to carry the account of Gormley & Co., and in February, 1907, their claim had increased by \$3,000. No payments had been made upon account of the chattel mortgage.

On 8th March, by virtue of an agreement between Thomas J. Gormley and Brophy Cains Limited, Thomas S. Church was put in charge of the business for Brophy Cains Limited, and as their manager; sales were advertised, and from 8th to 18th March over \$2,000 was realized in that way. On the 18th Brophy Cains Limited issued a warrant under their chattel mortgage to Church, and from that time Church was selling the goods for Brophy Cains Limited, and remitting the receipts to them. The mortgagor was never in possession of the goods covered by the mortgage subsequent to 8th March, 1907.

An elaborate argument was made that the plaintiffs were entitled to the relief claimed apart from the insolventcy of the mortgagor, because the mortgage security did not comply with the provisions of the Chattel Mortgage Act, and that taking possession did not cure these alleged defects.

R. S. O. 1897 ch. 148, as amended by 63 Vict. ch. 17, sec. 19, 3 Edw. VII. ch. 7, sec. 30, and 4 Edw. VII. ch. 10, sec. 35, now provides, where the mortgage is made to a company, that the affidavit of bona fides and the affidavit required upon the renewal of the mortgage may be made by the president, vice-president, manager, assistant manager, secretary, or treasurer of such company, or by any other officer or agent of such company duly authorized by resolution of the directors in that behalf. Any such affidavit made by an officer or agent shall state that the deponent is aware of the circumstances connected with the sale or mortgage, as the case may be, and has personal knowledge of the facts deposed to."

The affidavit of bona fides was made by Thomas Brophy, president of Brophy Cains Limited, the mortgagees, etc.;" and it was contended that this was defective, in that it was shown that there had been no resolution of the directors of the company authorizing him to make the affidavit, and that the affidavit did not state that he was aware of the circumstances connected with the mortgage, and had personal knowledge of the facts referred to.

As I read this section (3 Edw. VII. ch. 7, sec. 30), it is an officer or agent not being the president, vice-president,

manager, assistant manager, secretary requires the authority of a resolution of the directors to make the affidavit.

[Reference to Bank of Toronto 475; Freehold Loan and Savings Co. 44 U. C. R. 284.]

The effect of the amendment now appears to me to have extended to the Bank of Toronto v. McDougall and to require for the affidavit to be made by the president, manager, assistant manager, secretary or to officers or agents other than the directors should be conferred by resolution of the directors.

Then do the words "any such affidavit or agent" refer to and cover all the persons referred to in the section, or are they limited to the directors and agents only as require the authority of the directors?

It seems clear that they are limited to the directors. The insertion of the words "made by the directors" shews that the legislature was dealing with the authority required for the affidavit requiring the authority of the resolution of the directors. The section intended to cover the president, etc. The amendment would have read "any such affidavit or agent," etc. So, as I read the section, the affidavit of bona fides is not open to the directors. It is the affidavit of renewal.

The mortgage was in default, and the right to take possession of the goods of these plaintiffs to complain of the mortgage; or that no inventory was made or made by the mortgagee; and in any event I find the mortgage excessive, and that the taking of a mortgage otherwise necessary, was waived by the mortgagee.

Mr. Cassels urged that Glanville, defendant from the Universal Skirt Co., did not intend to continue this action, other than for the purpose of payment upon the notes, and that it was not necessary to question the validity of the mortgage. He said that, the action having been revived, the action poses, and that this objection is not available.

The action as against Brophy fails, and must be dismissed with costs.

BOYD, C.

NOVEMBER 26TH, 1907.

CHAMBERS.

MADGETT v. WHITE.

Parties—Addition of Defendant—Agent—Authority—Costs.

Appeal by defendants from order of Master in Chambers.
 Date 787, adding a defendant.

Grayson Smith, for defendants.

T. N. Phelan, for plaintiff.

BOYD, C., dismissed the appeal; costs in the cause.

BOYD, C.

NOVEMBER 27TH, 1907.

CHAMBERS.

ROSSITER v. TORONTO R. W. CO.

*Execution—Issue of Fi. Fa. —Regularity—Issue on Same
 Day that Judgment Signed and before Entry—Practice
 —Rules of Court.*

Motion by defendants to set aside a writ of fi. fa. issued
 plaintiff upon a judgment recovered against defendants
 damages.

D. L. McCarthy, for defendants.

J. MacGregor, for plaintiff.

BOYD, C.:—At common law the practice was that upon
 signing judgment execution might be issued, and no entry
 on the roll was necessary for that purpose. The signing
 judgment by the proper officer was the essential thing.
 The present practice under the Consolidated Rules has been
 assimilated to that type, so far deviating from the old Chan-
 cery practice. At first the writ of execution could not issue
 a month had elapsed after the entry of judgment. That

was shortened so that the writ of execution judgment was duly entered: Rule 843, 1888. By Rule 1359 (1894) that the writ read that every person was entitled to execution under a judgment "immediately after the judgment was duly signed;" and in the present Rule, in the present Con. Rule 843, to whom a sum of money is payable, the person is entitled immediately to issue execution, and be entitled to sue out execution immediately after the judgment being signed, and without the writ being entered.

The course pursued in the case of a judgment is signed to issue contentions for execution, though the judgment may not be entered in the office. Delay may and does occur in the office of business so that the clerical work is not attended to at once. This method is in use in the land registry obtains for like reasons in land registry. When a judgment for registration is brought in, the judgment is then marked on it—though the judgment is not the official record is not done till the judgment is reached in its turn.

Judgments take effect from the date of the judgment and may be signed forthwith, unless the judgment is in the manner of procedure in causes heard by the registrar to settle the minutes of the judgment passed and signed by him in authentication of the proper in form and expression. The judgment is then central office, where it is signed by the registrar. The judgment of the Court: Rule 628. The judgment is then turned over to the entering clerk, who enters it in the proper book, which completes it as to the entry. Rules 635, 637. But for purposes of execution the judgment is complete when it is signed. The judgment of record and facilitates the execution of the judgment otherwise verified if in fact a judgment of the Court. Wood, 3 B. & C. 457.

The judgment in this case is pronounced by the signature of the registrar, and the judgment is entered on the 22nd day of November, 1907, by the registrar. The Pleas. The writ of execution is then

as issued by the proper officer on production of the signed judgment.

In another aspect of the matter, the juxtaposition of *tes* should end the formal objection, for the Court will inquire into the fraction of a day to see whether the *it* actually issued before the judgment was actually signed; it will assume that all was rightly done: *Wright v. Mills*, H. & N. 488.

Altogether, I think the plaintiff is right, and the writ of *ut* was rightly issued by the officers of the Court, and the application should be dismissed with costs.

NOVEMBER 27TH, 1907.

DIVISIONAL COURT.

CLISDELL v. LOVELL.

Notice—Striking out—Separate Sittings for Jury and Non-Jury Cases—Practice—Discretion—Trial—Irregularity—Action for Equitable Relief.

Appeal by plaintiffs from order of BRITTON, J., ante 609, striking out a jury notice filed and served by plaintiffs.

The appeal was heard by MULOCK, C.J., ANGLIN, J., RE, J.

F. N. Tilley, for plaintiffs.

F. H. Blake, K.C., for defendants Mackenzie et al.

Cassels, K.C., for defendants Case et al.

F. N. Ferguson, for defendant Millar.

ANGLIN, J.:—In my opinion, the practice defined in *Montgomery v. Ryan*, 13 O. L. R. 297, 8 O. W. R. 855, as applicable to cases to be tried at Toronto, is in the interests of litigants and of the public, upon whom the burden of maintaining our courts of justice. The jurisdiction to strike out jury notices in Chambers as a matter of discretion should, however, be strictly confined to cases in which it is obvious that no Judge would try the issues upon the merits with a jury. If I could conceive it possible that any Judge would at the present day permit the trial of this action to proceed before a jury, I should be disposed to favourably

consider the plaintiffs' appeal. Not that I would not myself think for case with a jury, but, unless I express views of my brethren on the Bench, to bring this action to trial before a Court who would adopt any other than a merely striking out the jury notice as a mere perusal of the record.

I would dismiss the appeal with

MULOCK, C.J., for reasons stated in dismissing the appeal, inclining to the view that it was one for equitable relief, and therefore, irregular; but, if it were otherwise, the involved nature of the various statements of claim shewed that no proper case to be tried by a jury.

CLUTE, J., also agreed, for reasons stated. He was of opinion that the action was one exclusively to the jurisdiction of the Court to the Administration of Justice Act, 103 of the Judicature Act, should be tried unless otherwise ordered: *Pawson v. P. R.* 72; *Farran v. Hunter*, 12 P. R. 103; *Pawson*, 19 P. R. 174. He was also of opinion that no action which no Judge would try was a proper case for a jury. *v. Ryan*, supra; *Lauder v. Didmon*,

RIDDELL, J.

TRIAL.

PEACOCK v. B.

Sale of Goods—Misdescription—Deceit—Fraud—Contract—Proviso as to Condition—Evidence of Defects—Estoppel—Rescission—Notes Given for Price—Execution of Judgment

Action for damages for deceit and

E. G. Porter, Belleville, for plaintiff

W. Proudfoot, K.C., for defendant

RIDDELL, J.:—The plaintiffs had purchased a steam engine, and had given

They found the purchase not quite suitable, and entered into negotiations with the defendants, through their agent, one Melty, with a view of getting rid of a heavy liability. It was agreed upon terms that the plaintiffs should buy a second-hand engine the defendants had. An agreement was entered into in writing, in the form of an order signed by the plaintiffs, 21st April, 1905, whereby the defendants were to deliver on board cars at Seaforth, Ontario, on or about 1st May, 1905, or when further ordered, and ship to the Hill . . . one S. & M. portable 17 horse power second-hand engine in good repair and repainted, etc. And the plaintiffs agreed, amongst other things, "to pay . . . on or before delivery of above described machinery, as the purchase price therefor, the sum of \$700, as follows: cash before delivery of old notes \$100 and \$50 on shipment of engine, cash on or before delivery. Note due 1st January, 1906, \$50, note due 1st January, 1907, \$166, note due 1st January, 1908, \$167, note due 1st January, 1909, \$167, with interest at the rate of 7 per cent. per annum from 1st March after date of delivery of said machinery until maturity of each note and at the rate of 10 per cent. per annum after maturity until paid. . . ."

"The purchaser agrees with the vendor that the property and the title to the goods . . . shall remain in the vendor, and shall not pass to the purchaser, until the full payment of the . . . price and the said notes . . ."

It was further agreed that "no representations made by any person as an inducement to give and accept this order shall bind the company," and that the order "cannot be varied in any respect except in writing over the signature of an officer of the vendor."

The second-hand engine was at the time in or near Norwood; and, notwithstanding the terms of the order, it never was intended that the engine should be shipped to the purchaser from Seaforth.

Several times during the summer the plaintiff (so I shall nominate the active plaintiff Charles H. Peacock) spoke to the agent of the defendants, and asked him not to ship the engine, as his water power answered his purpose fully, and was not ready to pay the \$50 which he had agreed to pay for the shipment of the engine. He was told that the engine was all ready for him in Norwood, but still he made more than once the request I have mentioned. On 10th August,

1905, the plaintiff paid \$84 "to ap engine," so says the receipt, and in the agent of the defendants that engine—that he was not going to take

In January, 1906, the plaintiff Tripp, an agent for the Sawyer-Mas the engine in Norwood. I have no tion was not with a view of seeing w be accepted, but for the purpose justify, if possible, the refusal already on 20th January, 1906, one of the knowledge of all the alleged defects (\$16) of the first payment of \$100. That the old notes might be received this sum was so paid after the plaintiff the defendants threatening action (

On 9th February, 1907, the present writ against the present plaintiffs interest and for the amount of the interest. No appearance being entered that the solicitor received his instrument was entered for the now defendants 1907, for \$640.16 and \$32.58 costs. fi. fa. was placed in the hands of the Hastings, and under that writ goods sold, the proceeds of which, a sum the hands of the sheriff.

On 15th May, 1907, this action was added as a party defendant.

The action is framed substantially the plaintiffs alleging that the engine described, and relief is asked for alleged fraud practised upon the Court spoken of.

If I could find fraud in the conduct of the defendants, the clauses in the contract to avoid, as against the defendants, fraud, would be ineffective. . . .

[Reference to *Pearson v. London*

This most salutary rule must be applied to cases to which it applies, but here I

representation. My findings of fact have not been in the least modified by argument or further consideration. The engine is and was as represented by Tomelty; and I am unable to accept the statement of the plaintiff or his witness to what representations were made. And the engine was in a good state of repair, remembering that it was second-hand and not new. Tripp's standard of repair is quite too high—involving as it does rebuilding. In case of further proceedings, my findings at the trial may be looked at, but I do not think it necessary to say more at the present time on the question of fact.

Nor do I see how any fraud was perpetrated upon the court in the proceedings in the former action. The action must fail, therefore, on these grounds. In respect of the former action the plaintiffs could not succeed even if these difficulties were overcome.

With full knowledge of all the alleged defects, the plaintiffs went on and paid the balance of the first payment of purchase money upon the engine, and received back the old engine. There was no right to do this unless the present contract was valid; they therefore and thereby ratified the contract. I am not forgetting the form of the second receipt, but I find as a fact that the \$100 was not expenses, etc., in respect of the first engine (though the amount may have been fixed at \$100 in view of the amount of such expenses), but that it was, precisely as stated in the order, a payment on account of the \$700 purchase money.

The contract being valid, the notes given in pursuance thereof are also valid; and as to the \$50, the plaintiffs here cannot set up the non-shipping or non-delivery of the engine, which was prevented by their own act in first requesting delivery and then repudiating the purchase: *Steen v. Steen*, 9 W. R. 65, 10 O. W. R. 720, and cases cited. This would, of itself, perhaps, prevent an action of deceit, but I have decided that such an action cannot succeed.

The action must be dismissed with costs payable to both defendants; the sheriff cannot deduct his costs from the money on hand, but must look to the plaintiffs for the same. In the view I have taken of the facts, it has not been necessary to consider whether relief in respect of the former action should have been sought and would be given in this.

TEETZEL, J.

WEEKLY COUR

COLE v. LONDON MUTUAL F

Stay of Proceedings—Action on Variation of Statutory Condition—“Reasonable” — Onerous Terms—Expiry of Time for Motion—sec. 6.

Motion by the defendants to stay upon a policy of fire insurance unrequired under a variation of the statute after the arbitration provided for in the condition.

W. H. Hunter, for defendants

G. C. Gibbons, K.C., for plaintiff

TEETZEL, J.:— . . . In the statutory condition, which provides that the Arbitration Act, is struck out by the policy in these words: “10. Condition struck out and the following inserted. In pursuance of the powers conferred by sec. 145, sub-sec. 3, it is hereby expressly agreed, if any difference arises as to the value of the property insured, or the damages or loss, such value and damages, if any, to be paid by the company. The right to recover on the policy is dependent of all other questions, but to be determined by two competent and disinterested appraisers to be appointed by the assured and one by the company. The said appraisers shall first select a competent umpire, but in case of their failure to do so within 10 days, he shall be appointed by the County Court of the county wherein the policy was issued. The said appraisers shall then together estimate the value and amount in detail, stating the value of the property and damage and loss; and in the event of a difference of opinion between the appraisers, the umpire shall decide thereon.”

ling to agree thereon, shall submit their differences to the umpire so chosen, and the award in writing by the said umpire and at least one of the said appraisers as to the amount of said damage and loss shall be binding upon the assured and the company. The assured and the company shall pay the appraisers respectively selected by each of them, and each shall pay one-half the expenses of the umpire. (b) It is furthermore hereby expressly provided and mutually agreed, that no arbitration shall be had under condition No. 16, and that no suit or action against the company for the recovery of any claim shall be sustainable in any court of justice, until after an award shall have been made fixing the amount of such damage and loss in the manner above provided, in all cases where the company shall, within 30 days after completion of the proofs of loss, give notice to the assured that the company requires the amount of the damage and loss to be adjusted by the said appraisers."

Within 30 days after proof of loss, and before action, the defendants appointed an appraiser, and gave the notice provided for in the variation. No other notice of or application for arbitration was given or made.

The plaintiff refused to appoint an appraiser, and brought this action.

The defendants plead the variation as a bar to the action, and in the alternative they plead the 16th statutory condition, and by the statement of defence purport to appoint an arbitrator on their behalf.

If the variation is held to be invalid, and the defendants are entitled to rely on the 16th statutory condition, no application having been made in compliance with sec. 6 of the Arbitration Act, the motion is now too late and must be refused, on the authority of the judgment of the King's Bench Divisional Court on the appeal in *Cole v. Canadian Fire Insurance Co.*, ante 906.

The only other question for determination is whether the variation is binding upon the plaintiff, and that depends upon whether it can be held to be one that is "just and reasonable to be exacted by the company."

In the judicial consideration of variations of the statutory conditions, this rule for determining whether they are "just and reasonable" has been well settled, viz.: "Conditions dealing with the same subjects as those given by the statute and by variations of the statutory conditions should

be tried by the standard afforded by the law, and to be just and reasonable if they are in terms more stringent or onerous or more exacting than those attached by the statute to the same case. See *Smith v. City of London Insurance Co.*, 15 S. C. R. 69. See also *Ballagh v. Standard Insurance Co.*, 5 A. R. at p. 107; *May v. Standard Insurance Co.*, at p. 622.

Now, does the variation here "in terms more stringent or onerous or more exacting than those imposed by the statutory conditions" mean the variation in determining the amount of loss?

The most serious differences between the two conditions are: (1) the variation prohibits the insured from relying for by the statutory condition and substitutes for it an appraisal by the insured to pay the expense of the umpire, while the statutory condition provides that when the claim is awarded, costs shall follow. (2) In other cases all questions of costs are referred to the arbitration of the arbitrators.

If the last sentence of the variation is taken into account, it might fairly be argued that since the variation was made by Act 13, amending the Arbitration Act, the variation would be applicable to the arbitration Act. But the express provision against the arbitration condition which provides that the variation is not applicable to the reference, I think, is sufficient to prevent the company to exclude the application of the variation.

If the language used is sufficient to show that the variation is of the benefit and protection of the insured, then the variation Act (which I do not deem it necessary to discuss) would be within the rule and not manifestly unjust.

Without determining whether any of the provisions of the Arbitration Act are applicable to the variation, it is quite clear that the plaintiff would be bound to follow the findings of the majority of the appraisers, and not his own personal opinions only, and he would be bound to call witnesses and having them examined to determine the amount of his loss.

Both in this aspect and in imposing upon the insured the payment in any event of the expenses mentioned, I think the variation imposes upon the insured terms more stringent and onerous than are imposed by the statutory condition, and therefore not just and reasonable to be exacted by the company.

The motion to stay proceedings will, therefore, be refused with costs to be paid by the defendants in any event, and the trial of the action will proceed at the London winter assizes.

BOYD, C.

NOVEMBER 29TH, 1907.

WEEKLY COURT.

RE BATTERSHALL.

Will—Construction—General Legacies—Insufficiency of Estate—Abatement Ratably—Exceptions—Legacies to be Paid in Full—Bequest of Half a Share of Stock—Direction for Sale of One Share—Charitable Bequest—Benefit of Poor—Devise of Land to Municipal Corporation for a Public Park—Public Parks Act—Mortmain and Charitable Uses Act—Amending Act of 1902—Construction—Exemptions.

Motion by the executors of the will of William Battershall, deceased, for an order determining certain questions arising upon the will and codicils.

The testator died on 12th March, 1906. His will was dated 21st October, 1904. The following are the material parts:—

1. I nominate . . . Albert William Day . . . and William Lawrence . . . the executors and trustees of this my will.

2. I will, devise, and bequeath all my property, real and personal, to my trustees . . . upon the following trusts and to and for the following purposes.

1st. To sell and dispose of all my
collect . . . all sums of money

2nd. Upon trust to sell and dispose

4. Then upon trust to pay out of
sale and personal estate the following

A. The sum of \$500 to my sister

B. The sum of \$500 to . . . H

C. \$1,000 to my deceased wife's
child or children of any deceased bro
his, her, or their father's or mother's

D. The sum of \$100 to my pre
Smith.

E. The sum of \$100 to Mrs. Bar

The sum of \$150 to the Stratf
of England.

To my old neighbour James Ste
and to his brother Anderson Stevens
Mrs. Claxton . . . \$100. In c
predecease me, then the legacy .
estate.

F. The sum of \$250 to the chur
Church, Stratford, the interest deriv
pended towards purchasing books fo

G. The sum of \$500 to the sai
applied in the purchase of a peal of b

All above legacies to be paid in
decease.

H. The sum of \$2,000 to be gi
of the City of Stratford upon the
the same . . . and to apply the i
of suits of clothing for poor boys and
of 6 and 11. . . .

I. I further bequeath \$2,000 to b
City of Stratford and to be investe
terest . . . to be expended annu
or clothing to be given to the poor of
Christmas in each year.

J. I will and bequeath to the City of Stratford Hospital Trust the sum of \$200. . . .

K. I will and bequeath the sum of \$200 to the County of Perth to hold in trust for the County House of Refuge to be invested . . . the interest to provide . . . reading matter . . . for the patients. . . .

L. The sum of \$100 to the County of Perth, the interest . . . to be expended in moral reading for the prisoners in the county gaol.

M. The sum of \$500 to the Corporation of the County of Perth upon the following trusts: to invest . . . and to apply the interest in three prizes to be given at the North Perth Agricultural Fair each year. . . . In case the interest on the \$500 . . . is not required or called for for 3 consecutive years, the said fund and accumulated interest shall then be handed to the City of Stratford with the \$2,000 bequeathed . . . to the said city under clause I." . . .

9. All the rest and residue of my estate I will, devise and bequeath as under:—

One half to my said nephew Henry Albert Yelland and his heirs, and the other half to the children of my half brother known as Samuel Day . . . who may be living at the time of my decease.

10. I hereby declare that the above bequests under subsections "F.," "H.," "I.," "J.," "K.," and "M.," are to be kept invested by the corporations to whom they are devised as above . . . from time to time to the intent that the interest, dividends, and annual income may be a perpetual fund for the benefit, relief, or improvement of the parties or classes mentioned. And I hereby declare that the above corporations are to be trustees for the respective amounts bequeathed to them for all time to come.

The first codicil was dated 7th March, 1906. The material parts were as follows:—

I hereby amend clause E. in my said will by adding thereto the following legacies payable as therein stated: I give and bequeath George Warner . . . \$100; to Mabel Wood . . . \$50; to the Rev. W. T. Cluff . . . \$100; to my

half brother Samuel Day . . .
Day . . . \$1,000.

I also give and bequeath to my fr
to the amount of \$100 held by me in
Company; to his wife also \$100 sto
to Robert Shore . . . stock in t
amount of \$100; to William Warne
said company to the amount of \$50;
stock in the said company to the amo
to be transferred to the several par
decease.

I hereby amend clause H. in m
same from \$2,000 to \$4,000.

I hereby cancel clause I. of my s

And I direct that the provision r
said will, in case the legacy therein
to the city of Stratford, that the sa
the city of Stratford for the benefit
in my said will, instead of clause I
And that where clause I. is referred
read as H.

I give and devise to the city of S
a number of others, describing the
as and in connection with parts of
which have already been conveyed b
Stratford for the same purpose as is
from me to the said city of Stratfo

In all other respects I do confir

The second codicil was dated 8th
as follows:—

I hereby revoke the appointment
my executors, and nominate and app
Albert Day, usually known as Bert
stead.

I hereby revoke the legacy of \$100
give and bequeath to him \$50 in cash
paid in 3 months after my decease.

I give and bequeath to my said nephew the sum of \$600 in addition to the provision heretofore made in his favour.

Otherwise I confirm my said will and the codicil thereto attached.

F. W. Harcourt, for the executors and the infant.

E. Sidney Smith, K.C., for St. James Church and others.

W. H. Blake, K.C., for the Corporation of the County of Perth and others.

R. S. Robertson, Stratford, for the Corporation of the City of Stratford and others.

J. B. Davidson, St. Thomas, for the Warners.

BOYD, C.:—Prima facie, all general bequests are upon equal footing, and those who claim priority or payment in full, in case of deficiency of assets, must positively and clearly establish that it was the intention of the testator that the bequests should not abate ratably. This is in substance the test applied by Knight Bruce, V.-C., in *Thwaites v. Foreman*, 1 All. C. C. 414.

Such clear indication of intention is found in the words used in this will with respect to the legacies given in clauses A, B, C, D, E, F, and G.; after these bequests the testator says, "All above legacies to be paid in full one year after my decease." The words "in full" cannot be explained away, and express a manifest intention to provide for the payment in full of these legacies. . . .

[Reference to *Watson's Compendium of Equity*, 2nd ed., 1342; *Marsh v. Evans*, 1 P. Wms. 668; *Johnson v. Johnson*, Sim. 313.]

Consequent upon this ruling I hold that the beneficiaries mentioned in the first clause of the first codicil are to be promoted to the same preference in payment, by reason of the words used, "I hereby amend clause E. in my said will adding thereto the following legacies payable as therein stated." . . . As to George Warner, the testator provides in his second codicil as follows: "I hereby revoke the

legacy of \$100 to George Warner, and to him \$50 in cash in lieu thereof, to be paid at my decease." This withdraws the legacy from the estate which it had while made subject to the condition that the legacy bequest must abate.

The legacy to Bert Day of \$1,000 ranks for privilege under clause E of the bequest of \$600 made to him in the will given "in addition to" the provision in favour. The words are not sufficient to show preference.

To an infant, William Warner, Stratford Clothing Co. It appears that the legacy of \$100 each, and are not divisible. A best practical plan to solve the difficulty is to account to the infant for half of the legacy. I agree.

A bequest of \$2,000 to the city of Stratford for the benefit of poor boys and girls between the ages of 10 and 15, which is increased by the first codicil to \$5,000, will be valid as a good charitable bequest. See the authority of Re Kinney, 6 O. L. R. 100.

The devise of lots to the City of Stratford for the purposes as are set out in a conveyance made by the testator's life, to the city, is questioned. The lots conveyed by the testator for the purpose of the lots adjoin the others and are less than the others. The deed was made in 1905, and the testator died in the month of which month the testator died. The testator evidently to supplement the lots conveyed to the city as to make the park a more commodious place for the use and enjoyment on the part of the city. The last clause of the first codicil for the testator's property. By the general Act relating to the O. 1897 ch. 233, sec. 12, real and personal property devised, granted, or given to the city for the purpose of the formation of a park. The original Act back to 1883: 46 Vict. ch. 20, sec. 1.

this would amply justify and legalize what was done by the testator in completing his purpose with regard to Battershall Park, as it is called in the conveyance.

It is argued that the will is inoperative as to this land, because it was not made 6 months before the testator's death, under the Mortmain and Charitable Uses Act, 1902, 2 Edw. VII. (O.) ch. 2, sec. 8 (ii.). I do not read this late statute as affecting the operation of the revised statute as to public parks. "Assurance" in the Act of 1902 includes disposition by will. Section 3 provides that land shall not be assured to any corporation in mortmain otherwise than "under the authority of a statute for the time being in force." This in effect recognizes the validity of the Public Parks Act, and there is no pretence of repealing any of it under the schedule of Acts repealed by the Act of 1902.

The whole Act of 1902 is to be read as part of the Mortmain and Charitable Uses Act, R. S. O. 1897 ch. 112, and it cannot be supposed as intended to derogate from the express power given to municipalities to take and hold land for parks.

The case was argued as if the provisions of the Act of 1902, sec. 8, were at variance with the other legislation in the Public Parks Act. But I think that the heading of the statute, above sec. 8, "Exemptions," gives the clue to the real meaning. The difficulty of the Act in relation to charitable uses was dealt with . . . in *Re Barrett*, 10 O. L. R. 337, O. W. R. 790. But as to parks we have to consider the mortmain aspect of the statute, and clause 8 provides for the exemption of other cases from the operation of the Mortmain Acts in addition to those already existing, such as, e.g., those provided for the Public Parks Act. The Act of 1902 does not disturb any existing licenses or statutes authorizing holding lands in perpetuity: see secs. 3, 4, and 11; but extends the power to hold to other cases (parks, museums, and school houses), where the right does not exist independently of the Act of 1902. Cases that fall under the Act must conform to its methods of assurance or to time limit, but these directions are not pertinent to the present case.

I have now disposed of all the questions submitted. Assets out of estate.

RIDDELL, J.

TRIAL.

CLARK v. M.

*Sale of Goods—Action for Price—
of Title to Goods—Implied W
tor—Will—Provision for Ma
Children in Hotel—Sale of F
of Child to Object—Executors
Estoppel—Contract—Lease—Of*

Action to recover \$950, in the c
judgment.

M. Wright, Belleville, for plain

E. G. Porter, Belleville, for def

RIDDELL, J.:— . . . The
his lifetime the owner of a hotel
furniture, etc. By his will he gave
to his wife, but the will contains a
bequeath, and direct that my 4
Clark, Gladys Clark, Hattie Clark
shall have a home and maintenance
are married respectively, and that
shall be paid the sum of \$100 in re
tors hereinafter named out of my c

G. W. Clark died in August, 1906, in the session of hotel, furniture, etc., and at the time of her death, 16th August, 1906, in which she appoints the present sole executrix, and provides: "I give all my real and personal estate of what kind soever in the manner following, that is to say, to my daughters, Gladys Clark, Hattie F. Clark, share and share alike"—with an un

On 27th October, 1906, the plaintiff's mother, leased to the defendant the hotel for five years from 1st November, 1906. In

the following: "The lessee covenants with the lessor to purchase the household goods and effects in the said hotel . . . and to pay therefor \$950 upon the transfer of the license being duly made to him." The license was transferred in November, 1906, and the defendant took possession of the hotel under the lease and also of the furniture, etc.

On 30th October, 1906, an agreement was made wherein, after reciting that the defendant had leased the hotel and had agreed to purchase the furniture for . . . \$950, it was agreed "that the said lessor leases to the said lessee the said household furniture from day to day until not later than the 1st day of May, 1907, the said lessee to pay for the said furniture according to the covenant in the lease of the said premises, and to pay interest at the rate of 8 per cent. per annum upon the said sum of \$950, until the said amount is fully paid, from the 1st day of November, 1906."

Bearing in mind that this was before the transfer of the lease, the effect of this agreement was to bind the defendant to pay interest at the rate mentioned up to 1st May, 1907, and then, if the license should have been by that time transferred, pay the sum of \$950, and if not, then pay this sum as soon as the license had been transferred. On 3rd May, 1907, "the date 1st of May, 1907, is hereby changed, and shall be hereafter the 1st day of August, 1907, as if the said last date had been placed in this agreement . . . at the time of the making thereof." This postponed the time at which the \$950 was to be paid to 1st August, 1907. Rent was received for the furniture at the said rate up to but not after 1st August, 1907; plaintiff refused to receive rent for the furniture thereafter.

Edna Clark, one of the beneficiaries under the will of G. V. Clark . . . at the time her sister the plaintiff attempted to sell to the defendant claimed . . . a right to an interest in the furniture, etc., and in November, 1906, forbade the defendant concluding the sale, as she would not give up possession and use of the furniture, etc., and she has continued in the hotel, gets her board and maintenance, and insists that she has a right to use such of the furniture as she sees fit, though she does not interfere with the defendant's enjoyment of the same except the part in her own room.

This action was brought on 28th \$950. The defendant defends upon was a representation of absolute title has turned out not to be true by r Edna Clark. The will of G. W. Clark will of his widow. The defendant "has always been ready and willing, willing, to carry out the said agreemen chase money, upon receiving from the veyance fee from any other claim o same," and "denies that he has ever said household goods and effects on a g being given to him therefor." . .

Several technical objections were ta defendant—none of them of substance, not perhaps mention them here, as pleadings being asked for or made, the complain if he is held to his offer in t be well, however, briefly to dispose of

The first point . . . is that th parties, the one as owner and the other to the agreement to buy. The answer very transaction a new promise was n to pay.

Again, it is contended that the or mere offer to purchase. The succeeding that difficulty if there were one.

The real questions are three: First character, is there an implied warrant'y the plaintiff a good title to these chatte have the dealings between the parties

As to the first, it seems free from settled that in an executory agreement by implication, his title in the goods sell:" Benjamin, 4th Eng. ed., p. 622.

The second, if it depended upon would also, I think, not present any diff for maintenance is that it shall be at t himself distinguishes between the ho

No doubt, the beneficiaries are entitled to a home and reasonable maintenance at the hotel, and, no doubt, such home and reasonable maintenance would not be afforded by the bare walls of the hotel. But it does not seem to me that the widow could not at any time sell the whole or any part of the furniture, provided that she left or procured furniture of the kind and quantity necessary to furnish a reasonable home. If she at any time failed to do this, no doubt the beneficiaries would have a good cause of action, and, if necessary, the hotel would be sold to provide a home and maintenance for those entitled thereto. But that is quite a different proposition from that of the defendant, that is, that each beneficiary could have prevented her mother from selling any single article.

But the will of the widow is much more explicit, containing, as it does, an express bequest of this property to the 3 named legatees.

"The power of the executors to dispose of a chattel specifically bequeathed seems to have been formerly questioned, but succeeding cases in modern times have established it beyond dispute." Williams on Executors, 9th ed., p. 802. And whether the case might be different if it were established that the executrix had done anything in the way of assenting to the bequest, I need not inquire, as nothing of the kind is set up here, but, on the contrary, it appears that the plaintiff was insisting upon her right to sell from the beginning.

As to the last point, I have said that there is nothing in the conduct of the plaintiff which bars her right. If any topoppel exists, it exists against the defendant. With full notice and knowledge of the claim of others in and to these chattels, he agreed, if not by the agreement of 30th October, 1906, at least by that of 3rd May, 1907, to pay the sum of £50 to the plaintiff for them. I should, however, as at present advised, hesitate to decide against the defendant upon this ground alone.

It would have been better had Edna Clark and her infant sister been made parties to this action, and the action fought out with their claims fully explained and urged; but the solicitor for the defendant, who was also solicitor for Edna Clark, did not see fit to take this course. I cannot hold that the plaintiff should have made these parties—the plain

issue being, as between herself and the defendant pay the \$950.

There will be judgment for the plaintiff interest thereon from the date of the

MULOCK, C.J.

TRIAL.

NETTLETON v. TOWN OF

*Trial—Jury—Answers to Questions
—Mistrial*

The plaintiff was confined in the hospital established by the defendants, the municipality of Prescott, and in his statement whilst he was so confined the defendant failed to keep the lock-up reasonably warm, and in consequence occasioned to him a serious illness, and in action to recover damages because of the illness thus sustained. Other causes of action were stated in the statement of claim, but were abandoned.

J. A. Hutcheson, K.C., for plaintiff.

J. B. Clarke, K.C., and J. K. Macdonald, for defendants.

MULOCK, C.J.:—The evidence shewed that at the time of his imprisonment the plaintiff was suffering from a disease; that during the night following he was allowed to become very cold; that he was found to be seriously ill, was removed to the hospital, and suffered a protracted illness.

The case was tried with a jury, and the questions submitted to them and the

1. Were the defendants guilty of negligence in respect of the heating of the

2. If so, in what did such negligence or breach of duty consist? A. In not looking after the heating of the lock-up from 12 o'clock Saturday night until 12 o'clock Sunday noon.

3. Was the illness of the plaintiff which immediately followed his imprisonment caused by such negligence or breach of duty? A. Yes.

4. Was the plaintiff at the time of such imprisonment in reasonably good state of health? A. Yes.

5. If not, did he make known to Lee or Mooney the fact his health being impaired, and request that the cell be heated so as to meet all reasonable requirements because of his impaired state of health? A. No.

6. If the plaintiff at the time of his imprisonment had been in a reasonably good state of health, would the conditions to which he was subject during his imprisonment have caused the sickness complained of? A. Yes.

7. Were the defendants in control of the heating system which supplied heat to the cell? A. Yes.

8. Was Lee in managing the heating of the cell the servant of the defendants? A. Yes.

9. What amount of damages, if any, do you award the plaintiff? A. Award \$250.

After the jury retired to consider the questions, the plaintiff's counsel asked that in lieu of question No. 6 the following question should be submitted:—

“If the plaintiff was not then in a reasonably good state of health, and did make the fact known to Lee or Mooney, did the defendants take reasonable precautions to prevent his suffering injury?”

This question—numbered 6a—I allowed to be submitted to the jury, in addition to the 9 above mentioned, and the jury's answer to it was “yes.”

This answer may be paraphrased to read as follows:—

“Having regard to the illness of the plaintiff at the time of his imprisonment, the defendants took reasonable precautions to prevent his suffering injury.”

If such precautions were sufficient, at the time of his imprisonment, a fortiori the same would be sufficient at that time in a good state of health. In answer to question 6a thus arising, there was no finding of negligence or breach of duty.

Thus there are two inconsistencies in regard to a matter which goes to the root of the case, rendering it impossible to base a verdict in favour of either party, and the result is a verdict of acquittal.

C.A.

REX v. PAUL

*Criminal Law—Murder—Judge's
direction—Necessity*

Case reserved by ANGLIN, J., for the consideration of the prisoner, who was named Henry Schelling.

W. Proudfoot, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (Moss, C.J.O., and ROW, MACLAREN, MEREDITH, J.J.) was as follows:

MOSS, C.J.O.:—The case as stated was reserved for the opinion of the Court. Upon the question of the prisoner's guilt, a verdict was made on behalf of the prisoner on the first two other questions.

The first question in the case was whether the book, which certain evidence with regard to it was found, said to be the property of the prisoner, had dropped from his pocket, or whether it had been dropped or carried by the prisoner. The second question, found, was dealt with by the learned judge as follows:

Two books were produced at the trial: first, the book in question, which was marked for identification; and afterwards another book which was said to have belonged to the deceased, and was found some 5 months later than the book in question, and on the other side of the road from that on which the body was found.

The finding of the second book was deposed to by one Griffiths. Subsequently one O'Neill testified as to a statement made to him by the prisoner, in which the latter spoke of having found a book which had dropped from the clothing of the deceased, and of taking from it a cheque payable to the deceased—which he had subsequently cashed—after which he had thrown the book in the bush to one side of the path. O'Neill further stated that he knew a book had been found in the bush about 10 feet from the road near the tracks leading in to where the body was, pretty close to them, just off one side, coming down to where the body was.

As stated in the case, the learned Judge in his charge treated the case as if the second book was the only one in evidence, commenting upon the assumed fact that no book had been proven to have been found where the prisoner had told O'Neill he had thrown the book from which he had taken the cheque, as possibly reflecting upon the credibility of the prisoner's entire statement as to provocation on which he relied as a defence. The importance of O'Neill's evidence as bearing on this part of the prisoner's defence is quite manifest. At the conclusion of the charge, the learned Judge was asked by the prisoner's counsel to state to the jury that there was no evidence that the book spoken of by Griffiths had been the property of the deceased. The learned Judge did so, and in the course of his remarks stated that "no other book was found there which would answer the description;" and, in reply to a juryman who asked, "That is the only book?" he stated, "That is the only book which would answer the description except Paul's own book." The learned counsel for the prisoner failed to direct attention to the other book or the evidence relating to it, and it was, in consequence, overlooked.

In the case which is now before us, as amended by the learned Judge, he states that, at the instance of counsel for the prisoner, he had the evidence of Griffiths as to the finding of the second book read to the jury, but he did not direct

that the evidence of the witness O'Neill, the finding of a book about 10 feet from the prisoner had told O'Neill he had taken the cheque, and that the mark above quoted, made in answer to a question put to the witness, possibly had the effect of withdrawing O'Neill's evidence from the jury. We think that in this respect the direction upon a material question was a new trial.

This conclusion renders it unnecessary to answer the other questions, and, as the new trial is granted, it is better to abstain from expressing an opinion as to them. It is, however, not necessary to say that taking this course we are lending no support to the defence. But anything that might be said as to the propriety of the service on the new trial which is granted.

The answer to the first question is that there was no substantial misdirection, and that

THE ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, DECEMBER 12, 1907. NO. 29

ARTWRIGHT, MASTER.

DECEMBER 2ND, 1907.

CHAMBERS.

SWITZER v. SWITZER.

*Particulars—Statement of Defence—Action for Alimony—
Defence Alleging Adultery of Wife—Times and Places.*

Motion by plaintiff in an action for alimony to set aside the particulars given by defendant of the times and places of the acts alleged in paragraph 3 (a) of the amended statement of defence, or for further and better particulars, etc., because the particulars delivered were too vague, general, and indefinite.

G. H. Kilmer, for the plaintiff.

W. E. Middleton, for defendant.

THE MASTER:—The paragraph 3 (a) alleges that "the plaintiff had, at the defendant's home in the province of Manitoba, on different occasions, the exact dates of which the defendant is at present unable to give, committed adultery with one Arthur Bull, who was then working for defendant on his farm." Under this particulars were first given stating merely that such acts were "committed at the home of the defendant from January, 1903, to July, 1904, at different times in that period." Thereupon an order was made for further and better particulars. It is the particulars delivered in obedience to that order that are now attacked as still too vague and indefinite. These allege that defendant was absent from his home during January and February of 1903. That during that time "plaintiff and Bull cohabited together practically as man and wife." They then con-

tinued as follows: "Acts of adultery of the days during January and February, months of April, May, June, and July, were committed almost every day, the 1st day of April, 1904, and the 1st day of July, 1904, adultery being committed on both days. All said acts were committed at the place on his farm in Manitoba."

For the motion counsel cited *Pleading*, 6th ed., p. 174, and the authorities there cited.

On examination there does not appear to be any of those decisions which shews these facts to be sufficient. In *Coates v. Croyle*, 4 Tinsley, 100, the plaintiff had committed adultery with the defendant's deceased husband was found guilty, as plaintiff was seeking to recover damages. The U. written on a telegraph form addressed to the publican to the plaintiff, who had been in the house at the time. Even then the order only directed the publican to give such particulars as she could of the adultery, and she intended to rely upon. Both Lord and Justice, used language which would not be sufficient has been given here. The plaintiff's statement in amplitude of detail than is usual in a statement of what the accusations are that she intended to bring to trial. In *Bishop v. Bishop*, [1901] 1 Tinsley, 100, given, "the autumn of the year 1900" was mentioned. In that case there was no mention of times or dates, but only the names of the persons named of the servants and guests. The plaintiff had used insulting language to the defendant alleged; as it was a material fact that she had been humiliated before her servants and guests, and was entitled to know who they were. The principle is "that each side should state the particular case intended to be proved, and to have been very clearly done by the plaintiff, and the motion should be granted if the defendant in the cause."

The defendant, by leave, has filed a statement of these are the best particulars he can give in support of the

DECEMBER 2ND, 1907.

N, J.

CHAMBERS.

RE SOLICITORS.

*ors—Taxation of Costs—Order for Obtained by Soli-
ors ex Parte—Services Rendered by Solicitors as
liamentary Agents—Presumption as to Professional
aracter—Absence of Tariff—Nature of Services Ren-
red—Agreement for Fixed Remuneration—Conflict of
stimony—Reference to Taxing Officer—Costs.*

tion on behalf of a client to set aside an ex parte order
taxation obtained on 27th May, 1907, by his solicitors,
had delivered their bill of fees, charges, and disburse-
s on or about 20th April, 1907.

McKay, for the client.

Rayson Smith, for the solicitors.

INGLIN, J.:—The grounds upon which it is sought to set
order aside are: first, that the services covered by the
tors' bill were rendered not as solicitors but as parlia-
ary agents; and, second, that there was an agreement
een the solicitors and the client fixing the amount of the
neration.

as to the major part of the work covered by the bill, after
fully perusing all the material, it is my opinion that al-
gh a considerable part of the work charged for is such as
t have been done by a parliamentary agent not a solicitor,
r services for which remuneration is claimed were certain-
the kind which only a solicitor would be expected to ren-
For instance, advice appears to have been obtained, and
arged for, in connection with the scope of the Dominion
way Act, 1903, and of the Ontario Railway Act, 1906; the
antages and disadvantages of charters for railway purposes
ed by the Dominion and provincial governments, re-
tively, were explained to the client, and advice was also
n as to the requirements with regard to number and
ifications of directors, capital stock, bond issue, etc. The
espondence between the solicitors and Mr. Fitzpatrick is
y set out in the affidavit of Mr. Dunn, and a perusal there-
makes it reasonably clear to me that the business which

is the subject of the bills of costs is the profession of an attorney or solicitor, the attorney or solicitor was employed if he had not been an attorney or solicitor, or in which language of Lord Langdale, M.R., in 401, is quoted by Romer, L.J., in the character and scope of profession the test which is to determine whether the services rendered are such as entitle or subject the bill to taxation under the Solicitors' Act.

In England there are special provisions for the taxation of the bills of parliament for the services rendered by a solicitor. If any agent not a solicitor might have rendered the services, the Court of Appeal has held that a bill is not taxable under the Solicitors' Act, but is taxable if the bill is rendered, in whole or for a which a bill is rendered, in whole or in part, merely as a parliamentary agent, but if the bill would be retained to give, the fact that the services have been done by a parliamentary agent, does not preclude the right of the client to have the whole submitted to the Court of Appeal under the Solicitors' Act: *Re Baker, Lees, & Co.*, 11 Q.B. 101. The fact that we have no special provisions for the taxation of the costs of parliamentary agents does not preclude the right of the client to have the bill now under consideration submitted to taxation under the Solicitors' Act.

"Where the employment of a solicitor is with his professional character as such, and that his character formed the ground of the client's employment, there the Court will exercise its discretion under the Solicitors' Act: *re Aitken*, 4 B. & Ad. 47.

The fact that there is no tariff for the taxation of the bills rendered presents no obstacle to a bill being submitted to a taxing officer, in a case, proceeds having regard to the nature of the services rendered and the business in which the bill is rendered. *Will*, 26 A. R. 27, pp. 39, 40; *In re* 498; *In re Johnston*, 3 O. L. R. 1; *In re* 16 P. R. 162; *In re Richardson*, 3 C.

Were it admitted that there was no special provision for the taxation of the bills rendered by the client and the solicitors for a firm, the fact would not

regular, and it must be set aside: *Re Inderwick*, 25 Ch. D. 79; *In re Farnshawe*, [1905] W. N. 64; *O'Connor v. Gemmill*, 26 A. R. at p. 38.

In the present case, however, although the applicant swears positively that there was an agreement between himself and the solicitors for their remuneration at a fixed sum, covering the greater portion of the work included in the bill sought to be taxed, one of the solicitors makes affidavit that no agreement or arrangement was made at any time between myself or my said firm and Mr. Fitzpatrick as to the amount of the expenses of obtaining a charter." Neither opponent has been cross-examined upon his affidavit. If the statement of the solicitor is correct, the solicitors are entitled to maintain their order.

I am not prepared, upon the material before me, to find whether that there was or was not an agreement. This is a question which the taxing officer, who will be in a position to take evidence upon it, can determine. Upon the ordinary reference to taxation at the instance of a solicitor, the question of retainer or no retainer is for the determination of the taxing officer. I see no reason why he should not with equal propriety determine this question of agreement or no agreement. To set aside the present order would be in effect to give to the client the benefit of an alleged agreement which has not yet established. This I must decline to do.

The *ex parte* order for taxation should, however, be varied by inserting a provision that before proceeding to tax a solicitor's bill, the taxing officer shall inquire and determine whether or not there was an agreement binding upon the parties that the remuneration for the work in connection with obtaining of a charter for the Nipissing Central Railway Company, and the organization of the company, including preliminary fees, should not exceed \$1,100, and that in the event of its being found that such an agreement was made, the taxing officer shall not proceed further under the order, but shall report his finding upon such inquiry; but that in the event of his finding that there was no such agreement, he shall proceed under the order for taxation.

The present application will be dismissed. The costs, however, will be reserved to be disposed of by a Judge in Chambers, after the taxing officer shall have made his report and certificate upon the reference.

DIVISIONAL CO

PERKINS v

McDONALD v. RECORD

CURRIE v. RECORD P

*Label—Several Actions against D
solidation — R. S. O. 1897 ch
Labels—Trial.*

Appeal by defendants from or
874.

W. Nesbitt, K.C., and E. G. Lo

R. McKay and G. Grant, for

THE COURT (BOYD, C., MAGE
the order by directing that the t
plaintiff, to be selected by that p
in the meantime all other actions
further hearing of this appeal sta
the actions selected has taken plac
costs in the cause.

RIDDELL, J.

WEEKLY CO

HALL v. BE

*Evidence—Direct Conflict—Appea
Forgery—Perjury—Prosecution*

Appeal by plaintiff from repor
Bay, on various grounds.

H. H. Dewart, K.C., for plaint

H. D. Gamble, for defendant.

RIDDELL, J.:—In this appeal counsel for both parties state that either plaintiff or defendant was, before the Master, guilty of wilful and corrupt perjury—and I fear that this statement must be considered well founded. Upon the reference which I directed to the Master at North Bay. The plaintiff, a solicitor of the Court, produced a document which he swore to as signed by the defendant in his presence. This the defendant denied. The effect of the Master's finding is admitted to be that, in his judgment, the defendant's account is the correct one. It is a matter of credit to be given to the witnesses, and "according to the well established practice in Ontario," the Master is "the final judge of the credibility of these witnesses:" *Booth v. Ratte*, 21 S. C. R. 37, 643 . . . ; and see *Fawcett v. Winters*, 12 O. R. 32; *Muter v. Pilling*, 9 Q. B. D. 736.

The plaintiff upon this appeal relies upon a comparison of the disputed signature with two signatures of the defendant, the one to a receipt and the other to an indorsment upon a cheque; but I am unable to see that his case is at all strengthened (in my judgment it is weakened) by such a comparison. The evidence of the defendant, if one were to judge of it simply as it appears in black and white, might have been in some instances more ingenuous, but no one who has not seen the witness can say how far his apparent hesitation should affect his credit. Nothing is more dangerous than for one who has not had the opportunity of seeing and hearing a witness to attempt to say what weight should be given to an apparent shuffling.

The only other point is whether the defendant was prevented from doing certain work by the plaintiff or his wife. The witness says (Q. 321) that the plaintiff said to the effect that you were not to have your fence made to look like a chicken crop, but I had better leave off from making it until you saw Mr. Berry." These words may intimate anything, from a gentle suggestion to a truculent threat, according to the tone and emphasis. I cannot tell. I have only the skeleton, the dry bones of the evidence. I have only the old type—the Master had the witness before him, and he could and did determine the real effect of these words. He has held that this was an order to stop building the fence. It was open to the Master so to find, and I cannot interfere. The other matters are too clear even for argument.

The appeal will be dismissed with costs.

Had I found in an action tried has by implication found here, that perjury and forgery or either of them a prosecution, as in the recent case 10 O. W. R. 691. (The defendant was frequently convicted for perjury on the Barrie.) The plaintiff here is not an officer of the Court has condemned the attention of the Crown Attorney drawn to the matter. It is also a the Law Society of Upper Canada

MABEE, J.

TRIAL.

COSGRAVE v. BANK OF

Contract—Breach—Bank—Agreement—Authority of Agent of Bank of Borrower—Incomplete Agreement of—Proof of Damage.

Action for damages for breach of contract to advance money to plaintiffs.

J. H. Moss and C. A. Moss, for

H. S. Osler, K.C., and Britton

MABEE, J.:—The plaintiffs under a definite, and binding agreement to advance to them the sum of \$75,000 to the plaintiffs, and in default, of course,

It is admitted that in the spring of 1900 the bank agreed to make advances up to \$40,000 and those advances were submitted by the bank to the Toronto agency, to the head of the bank, and the amount was sanctioned; and part of the advances were made. The plaintiffs say that in July, 1900, the bank agreed to advance \$75,000 in the place of Hinds's place.

There is no doubt that several interviews took place with Mr. Kilvert. Mr. James Cosgrave says that in July he asked Kilvert to advance \$125,000, and that the latter said it was a new proposition and would have to be submitted to the directors. Mr. Mossop says Mr. Kilvert said he would have to further consider this proposal, and he (Mossop) understood this meant he would have to consult some other authority. Mr. Kilvert says he had no authority to make the advance they were asking without the sanction of the head office; that he never submitted the application to the head office; and was never authorized to make the advance. This is corroborated by Mr. Turnbull, the general manager. I think the case fails upon this ground alone. The plaintiffs were dealing with an agent with limited authority, and were expressly told by the agent that he could not make the advance without the sanction of the directors or head office. As the plaintiffs themselves say, it is thus incumbent upon them to shew that the bank, through its directors or proper authority at the head office, authorized the agent to make the advance; the contrary of this has been proved.

The case might have been different had there been a general holding out by the defendants of their agent to make agreements of the kind contended for by the plaintiffs, and the agreement had been satisfactorily proved.

I am not overlooking the fact that the plaintiffs say they were led to suppose the matter had been sanctioned at the head office, when, as they put it, the arrangement would go through if the plaintiffs contributed the \$50,000, leaving the advance to be \$75,000.

This is not the case of the plaintiffs having the right to suppose the agent was not exceeding his authority, or there being a secret limitation of authority, but a case where the plaintiffs were aware that no such advance could be made by the agent without the express sanction by the principal: *Bowstead on Agency*, 3rd ed., p. 274.

In *Forman v. The Liddesdale*, [1900] A. C. 190, it is said that where the plaintiffs did not really know the extent of the agent's authority, it was their business to learn it, and they were bound by the restrictions which existed between the principal and the agent. See also *Leake on Contracts*, 5th ed., p. 347.

I think, in the second place, that no such completed arrangement has been proved as could be enforced, even had Mr. Kilvert authority to enter into it.

Mr. Auger McVean stated that "he was satisfied the bank if we did ours." There was no question whether the bank, or the Cosgrave Reinhardt, were to be first repaid the proceeds of the mortgage. Mr. McVean said: "no arrangement made as to whether the bank or the Cosgrave Reinhardt were to be paid back first." Also: Mr. Cosgrave said the brewers were to be repaid first, but Mr. Kilvert said nothing was said: "Something was said that after the mortgage was completed they could mortgage and pay the bank's liabilities."

Mr. Reinhardt said: "As to whether the bank or the brewers, was left to be repaid first, no agreement was drawn. I expected an agreement to be drawn when it would be settled whether the bank or the Cosgrave Reinhardt was to be repaid first." And in re-examination Mr. Reinhardt said: "The agreement I spoke of would be as to whether the bank or the brewers were to be repaid first."

Now, all this points to an inconsistency between the plaintiffs and defendants. The bank and the plaintiffs of the bank were materially interested in the mortgage. The bank was waiting for a complete proposition from the plaintiffs, and was submitting the new request of the plaintiffs to the head office. It is true that later on an agreement was drawn between the plaintiffs themselves, and the bank was not a party to it, and it is true that Mr. Kilvert had any knowledge of its contents.

I have no doubt that the plaintiffs would have made the advance, but the matter had never reached a point where the necessary information to submit the matter in detail to the head office.

The foregoing renders it unnecessary to say anything of damage; but, had an agreement been drawn, the authorities seem to shew that the rate of interest was the difference between the rate of interest the bank would pay and the rate the plaintiffs would pay for money elsewhere. . . . Mennie v. Fletcher, 17 C. B. 21; Hamilton, 25 O. R. 64, 22 A. R. 41; African Territories Limited v. Walli-

can be regarded as an authority for the plaintiffs' contention, although there are some expressions of opinion that some form of special damage might be recovered. See *Bahama Sisal Plantation Co. v. Griffin*, 14 Times L. R. 139, where the South African case was cited.

In any event it was not shewn that the plaintiffs could not in February, 1907, have obtained the money elsewhere, had united and persistent effort been made. It was then that the plaintiffs knew that the bank would not make the advance, and the reason for the plaintiffs not being able to obtain the money in August was because of the changed conditions of the money market; the like conditions did not exist in February.

The plaintiffs are in this additional difficulty on the question of damages. They say the agreement was that the bank was to make the advance at "current rates;" this would mean an increase from time to time upon renewals, if the rate of discount advanced; so if the plaintiffs had made application for and obtained the money elsewhere, at or about the time the bank refused to make the advances, the rate payable by them elsewhere would have been the same rate the bank would have been entitled to charge, and so there would have been no damage.

I think the plaintiffs' case fails, and the action must be dismissed with costs.

DECEMBER 3RD, 1907.

DIVISIONAL COURT.

CUMMINGS v. DOEL.

Vendor and Purchaser—Contract for Sale of Land—Completion of Houses by Vendor—Purchaser to have Right, on Default of Vendor, to Complete and Deduct Price from Balance of Purchase Money—Payment of Balance of Cash—Refusal of Purchaser to Deliver Mortgage for Part of Price, Houses being Incomplete—Action for Declaration of Rights—Mandatory Order for Delivery of Mortgage—Lien—Costs.

Appeal by defendant from judgment of BRITTON, J., ante 331.

T. D. Delamere, K.C., for defendant.

A. B. Armstrong, for plaintiff.

THE COURT (BOYD, C., MAGER) the judgment by inserting a declaration of lien for the amount due in respect of the work alleged not to have been done in accordance with the agreement of 30th October, 1911, to be delivered until that is ascertained by the Master. Further directions and costs.

CARTWRIGHT, MASTER.

CHAMBERS.

CURRY v. STAR PUB

Pleading—Statement of Claim—Irrregularity of Trial other than that Named—Waiver by Taking Proceedings

Motion by defendants in an action as irregular the part of the statement of claim naming Toronto as the place of trial, the place of summons named Cayuga as the place of trial.

E. G. Long, for defendants.

Gideon Grant, for plaintiff.

THE MASTER:—Whether in such a case a claim is irregular is one on which no issue exists. The point has never been decided and is referred to in *Town of Oakville v. The Mayor* and in *Geedy v. Wabash R. R. Co.*

If such a variance is to be considered a waiver, it should be moved against at once, as the taking of such steps would be a waiver. Here the step taken by the motion to consolidate is a step taken by the Divisional Court. The statement of claim is due on or before 15th November, and the trial again on 22nd November, time was given for the solicitor for defendants consenting to the trial, so that plaintiff should not be allowed to delay any sittings, "in case any of the cases are not tried. This could only refer to a trial at the next sitting."

In these circumstances, I follow my decision in *Geedy v. Wabash R. R. Co.*, supra, and dismiss the motion without costs.

I venture to repeat what I said in *Geedy's* case, that it would save trouble if there was no place of trial named unless the writ is specially indorsed. It is only named then because, if a defendant avails himself of Rule 171, there would be no other way for the plaintiff to comply with Rule 529. See *Segsworth v. McKinnon*, 19 P. R. 178. If this action is not tried at the Toronto January sittings, the defendants can move to have the venue changed to Cayuga, if so advised, notwithstanding the order now made.

RIDDELL, J.

DECEMBER 4TH, 1907.

CHAMBERS.

RE HEWARD'S TRUSTS.

Trusts and Trustees—Trust Estate—Expenditure of Principal on Repairs—Consent of Beneficiaries—Leave of Court.

Motion by the Toronto General Trusts Corporation, trustees, for an order authorizing the expenditure of part of the principal of the trust estate in repairs.

J. T. Small, for the trustees.

RIDDELL, J.:—By deed of 13th May, 1857, J. G. conveyed to certain trustees certain mortgages in the deed of conveyance mentioned. By this deed the trustees were given the power to use such part of the proceeds of the said mortgages as they thought fit in purchasing real estate and also to sell real estate so bought, and invest the proceeds. All the principal moneys and the real estate were to be held by the trustees, upon trust to pay the interest, dividends, and profits half-yearly to J. O. H. for the joint lives of himself and wife; in case she survive him, then to her for life, and at her death to their children then surviving, in such shares and according to conditions, etc., to be made by J. O. H. and his wife; in default of such appointment, then accord-

ing to appointment of the widow, equally; if no child survive, then appoint, and, in default of a will, to Statute of Distributions to her per

Certain real estate, with a house, the trustees, and it is now desired to be expended by the successors of the house in repairing the house. J. O. H. is living, and there are 7 children of

An application is made to the court for \$3,000 of the principal money in suit, that the widow and all the children should file a formal consent, which any one could complain would be made by the children before the widow, an event improbable.

In the facts of this case, as matters have been presented by affidavits filed, I think a case has been made out for the authorities referred to in Lewin v. Lewin, 573, to which reference may be made.

The trustees will have their costs.

RIDDELL, J.

TRIAL.

WEBB v. ROBERTS

*Vendor and Purchaser—Contract for sale—
presentations by Vendor Inducing
—Approbation after Discovery
Damages for Deceit—Possession*

Action by vendor for a declaration of the plaintiff's rights under an agreement of sale and purchase of land, and for rescission, mesne profits, etc. Counterclaim for rescission and damages.

J. B. Clarke, K.C., and C. Swainson,
A. J. Anderson, Toronto Junction

RIDDELL, J.:—The plaintiff, with some assistance, had, in the vicinity of Toronto, built a cottage, himself apparently the carpenter. The wife of the defendant, an Englishman who had been in this country but a short time, seeing an advertisement . . . of this cottage for sale, and thinking that it would answer the requirements of her husband and herself, went to the plaintiff about it. The plaintiff represented to the defendant's wife, and afterwards to the defendant and his wife together, that the house was a well built house, built after the old English style, and not jacked up like houses in this country, that it was of good workmanship and double-boarded on the outside, and warm and comfortable. He added that the place was "a little Eden." He told them also that they might trust a brother Englishman. Some statements were made as to the title, which I do not think it necessary to set out.

Although the wife did make a casual inspection of the property, it is apparent, and I find as a fact, that the contract was entered into upon the strength of the plaintiff's representations. The very assurance that they might trust a fellow countryman, instead of acting as a danger signal, as it would to those more experienced in the world's ways, seems to have prevented the defendant and his wife from having any suspicions.

A written contract was entered into on 22nd April, 1907, between the plaintiff and defendant, for sale of the property for \$1,400, \$125 in cash and \$10 on the 22nd day of each month until 22nd May, 1917, and \$15 on 22nd June, 1917, interest on unpaid portion of purchase money to be paid quarterly on every 22nd day of July, October, January, and April, until the whole should be paid. Possession was to be given at once, and as soon as the purchase money and interest should be paid the plaintiff was to convey the property. It was further provided that time should be of the essence of the agreement, and, unless the amounts should be punctually paid, all payments made should be forfeited and all rights of the defendant should cease and determine and the plaintiff be at liberty to enter and lease or sell without accounting to the defendant—but that such entry or lease or resale should not impair the right of the plaintiff to enforce the covenant for payment.

The defendant made the down payment of \$175, and took possession of his purchase. He soon found that it was not at all what he had been led to believe. It was not well

built. I have no evidence as to what was meant by "old English style," but clearly the parties understood by that something better than our modern Canadian style—and the fact is that the house was not better, but, if anything, worse than the ordinary Canadian house of the kind, and it was "jacked up." The workmanship was not good (the plaintiff seems to have been an amateur carpenter); the house was not double-boarded on the outside, and it was not warm and comfortable. . . . All these defects became apparent from time to time, but the defendant, instead of throwing up his purchase, went on and paid the instalments due 22nd May, \$10, 22nd June, \$15, and 22nd July, \$10, and interest, \$18. Before this last mentioned day the defendant and his wife were aware of all the faults of the house and of the falsity of all the misrepresentations of the plaintiff. On that day, upon paying the plaintiff the instalment of principal and interest, the defendant told the plaintiff that the house was not double-boarded on the outside, and he (plaintiff) said that if they used felt paper, the defect could be remedied. The defendant paid the instalment, having made up his mind to take his chance of the remedy suggested by the plaintiff being effective. It did not so prove—the defendant changed his mind—and on the 22nd August coming round, he refused to pay the instalment then due, but continued to hold possession, lest he should lose the money he had paid, including the \$20 or \$30 he had put on in repairs.

This action was brought on 5th September. The plaintiff's pleading set out the agreement and the payment by the defendant, but added that when the instalment became due on 22nd August, "the defendant neglected and refused . . . to pay the same, whereby all the said payments made by the defendant . . . became forfeited to the plaintiff . . . and the plaintiff became and is entitled to . . . take possession . . . but the defendant refuses to deliver up possession . . ." And the plaintiff claims possession, \$15 a month for use and occupation since 22nd July, and general relief. The defendant pleads misrepresentation and fraud on the part of the plaintiff, and claims rescission of the agreement, return of his purchase money, and general relief.

At the trial (the defendant still insisting upon and retaining possession) I found the facts I have already set out and others, and these findings may be referred to.

Had it not been for the conduct of the
 tinuing his payments and his occupation after
 aware of the falsity of the representations
 induce—and which did induce—him to execu
 there can be no doubt that he would have
 rescission. “Where representations are ma
 to the nature and character of property whic
 the subject of purchase, affecting the value of
 and those representations afterwards turn ou
 rect and false, to the knowledge of the party
 a foundation is laid for maintaining an acti
 of common law to recover damages for the
 tised: and in a court of equity a foundation i
 ting aside the contract which was founded upo
 Lord Lyndhurst in *Attwood v. Stuart*, 6 Cl. &
 Directors and C. R. Co. *Venezuela v. Kisch*, 1
 99, 121.

I find fraud in all the representations and
 as to the house being warm and comfortable.
 the delay would not deprive the defendant of
 rescind: *Erlanger v. New Sombrero Phosphate*
Cas. 1218; *Clough v. London and North Wester*
L. R. 7 Ex. 26; *Morrison v. Universal Marine* 1
L. R. 8 Ex. 197.

The plaintiff, however, contends that, with
 edge of all the facts, the defendant elected
 contract, manifesting this election by paying th
 due 22nd July, and going on repairing and “fi
 house in a manner which he thought would resu
 it satisfactory. If a party, “knowing of the
 “to treat the transaction as a contract, he lose
 rescinding it.” *Campbell v. Fleming*, 1 A. & E
 the discovery of a new ground for rescission de
 this right so lost: *S. C.*, at p. 42; *Walton v. S*
R. 213.

So that, even if it should be considered th
 sentation that the house was warm and comfor
 on 22nd July been demonstrated to the defen
 false, he would not, upon this being proved, a
 right to rescind if it had once gone. Moreover,
 that the last mentioned representation was in

lent, though I do find it was a misrepresentation, as I think this was for rescission: *Shurie v. White*, 12 Q. B. 773, and cases cited, especially 12 Q. B. 773.

I cannot look upon the acts of the instalment due on 22nd July, the house and repairing it to suit him than unequivocal acts of ratification of the voidable contract. The necessary in order that there shall be a procured by fraud and the like is laid down in "You must have full knowledge of the act of confirmation:" See 30 L. J. N. S. Ch. 838, 842. "A voluntary act with knowledge:" *Darnley*, 36 L. J. N. S. Ch. 404. There must be all the facts, full knowledge of the facts arising out of those facts, and an absence of undue influence by means of which the act was procured:" *Moxon v. Payne*, L. R. 3 Ch. 1. It is considered, as good sense requires, that a man can be held by any act of his which he was fully aware at the time, notwithstanding which the defect of title depends, but it is not a point of law:" *Cockerell v. Cholmellet*. To have any effect or validity it is necessary that the party was fully acquainted with the transaction to be impeached, and knew the transaction to be impeached, and with this knowledge he freely and spontaneously executed the transaction." *Trendenditch*, 2 B. & B. 304, 317.

[Reference also to *Murray v. Palmer*, 10 Q. B. 486.]

But, applying any of these tests to the facts, I consider what was done by the defendant was an unequivocal act of ratification—admission.

[*Bernard v. Riendeau*, 31 S. C. 100.]

Here there was no repudiation, and I think, a complete ratification by the defendant with knowledge and intending to ratify, and his changed his mind makes his case

on 22nd July, and when going on with his repairs. I think, therefore, the contract is binding and is not to be rescinded.

That decision does not, however, dispose of the case. A common law action lies for deceit inducing any one to enter into a contract, and may be pursued though the contract is not—or cannot be—rescinded. Here there was deceit inducing the contract, and the defendant is entitled to such damages as he can shew resulted from his entering into the contract. By entering into the contract he has been induced to pay certain sums of money to the plaintiff. Not having carried out his contract, he cannot claim the difference in value between the property as it should have been and as it is—he has disabled himself from taking that remedy; and the contract provides that money paid thereunder shall be forfeited, and so cannot be recovered back by an action on the contract. But why should damages not be given to the defendant for being induced to enter into such a contract. I do not see any reason. . . .

[Reference to *Pearson v. Dublin*, [1907] A. C. 351.]

The damages are the amount of money he has paid, less the value he has had under the contract, that is, the value of the property for occupation purposes. That I fix at \$10 per month for the time the defendant was in possession. (I am informed that he has now given up possession.) Except by consent I can deal with this value only up to the time of the trial—but, if both parties consent, I fix the same amount during the whole period of the defendant's occupancy. The plaintiff being under the contract entitled to retain the money paid, and the defendant to recover the same amount back for damages for deceit, together with the \$20 paid by him for repairs, less the value he has received for the occupation of the property, the result is the same as though it should be ordered that the plaintiff return the amount paid him, less rent at \$10 per month, the sum of \$20 being allowed on the rent.

The result financially is the same as though the defendant had succeeded upon the claim for rescission; had I thought that that claim should succeed, I should have given no costs to either party; and, in the result I have arrived at, I think no costs should be given.

MABEE, J.

TRIAL.

ROBERTSON v. RO

*Landlord and Tenant — Action for
Land—Reservation of "Life In
Possession — Occupation Rent
Rights of Executors of Grantor*

Action to recover \$2,400 for a
and occupation of the east half of
sion of South Monaghan.

A. P. Poussette, K.C., and L.
for plaintiffs.

F. D. Kerr, Peterborough, for

MABEE, J.:—On 2nd May, 18
veyed the lot in question to his s
the expressed consideration being
The habendum in the deed, at the
portion, contains the following: "a
life interest therein of the said
part." On the same day William
a mortgage of the lands to his sister
Ann Robertson, for \$3,000, payable
years, bearing interest at 4 per cent
and at the same time gave them
\$1,000. The father gave up possession
stock to the son, who had just mar
time was worth about \$5,000. The
the stock consisted of or its value.
26th September, 1906; and the de
Robertson, is his widow and admini
on 12th January, 1907, and the p
Mary Ann Robertson, are his exec
having been granted to them on 3
will is dated 28th May, 1906, and
testator is given to the daughters
is no direction as to payment of de
penses.

On 2nd May, 1898, the daughters, by a document under seal, "granted and released" to the defendant, in consideration of the aforesaid \$4,000, represented by the mortgage and promissory note, "all right, title, interest, claim and demand whatsoever, both at law and in equity or otherwise howsoever, and whether in possession or expectancy, and whether as legatees, heirs-at-law, or otherwise howsoever, of them or either of them, of, in, to, or out of the real and personal estate of their father."

The father had no estate of any kind whatsoever at the date of his death, unless he was entitled to be paid some sum of money for rent or for use and occupation of these lands by his son.

After the death of the son, his widow, the defendant, left the farm, leasing it to a tenant; and some one on behalf of the father—it did not appear whether by his personal direction or not—gave notice to the tenant to pay rent to him, and, without the knowledge of the defendant, the tenant did make some payments, and since the father's death made payments to the plaintiffs; the amount of such payments does not appear.

During the life of the son the father never made any demand of any kind upon him for the payment of rent or for use and occupation; they were living upon friendly terms, the father frequently visiting at the farm, and being always welcomed to come and go as he pleased, but in no sense did he permanently reside there. The son's widow says the farm stock and grain on the farm at the time the father left belonged to her husband, but the written agreement made at the time seemed to treat the farm stock as belonging to the father.

It was stated at the trial that at the time the father died he was indebted to two banks, but no evidence was given as to the amount or the circumstances connected with these liabilities, and, for all that appears, it may have been an advance for the daughters. It was also said that the funeral expenses have not been paid. The father's will gives the estate to the plaintiffs, "provided" they pay the funeral expenses. The son paid the \$4,000 to his sisters in consideration for the release they executed, and in all respects fulfilled his part of the agreement.

It is clear, I think, that the plaintiffs are not entitled to recover anything from the defendant for their personal benefit. As "legatees" of their father they released the

son. The \$4,000 paid to them was sent and future interest in the land order the son, or his estate, now to these plaintiffs would be absurd.

It was contended that they had the interest of these alleged creditors; there is no sufficient evidence of this to these creditors—no claims were put forward, than, in a general way, that there was to the banks by the father. Again, what effect of the reservation of a "life estate" for the father's benefit? What is clearly not intended that the son should have the farm to the father, and interest to the sisters. There is no action from which it can be assumed that they were placing themselves in the position of creditors; all the circumstances lead to the contrary. Nor is there anything to lead to the conclusion that he was to pay for the use and occupation of the "interest" I do not think has at all been a "life estate." A right to live in 3 rooms during his life, might have been reserved in the father; it is impossible to find any equivalent of this doubtful "interest" which has acted anything, and how can it be assumed that both the principal parties to the action? The Court should step in and say they should have the full rental of the lands, and if they do not then what part should be paid? They should be paying any sum whatever; certainly, but it should not be more than sufficient to pay the interest and no evidence has been given as to the value of the land is clearly inequitable that the plaintiffs should be at the expense of the son's estate. I do not think a claim that can be reached in this way is sufficient for creditors, even had the existence of the land sufficient exactness.

The action must be dismissed

MACMAHON, J.

DECEMBER 4TH, 1907.

TRIAL.

GILLIES BROTHERS CO. LIMITED v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION (No. 1).

Timber—Destruction by Fire—Crown. Lands—Timber License—Renewal—Expiry of License—Timber Vested in Crown—Action by Licensees for Damages for Negligence in Operation of Railway.

Action for damages for timber burnt upon the limits of plaintiffs, as alleged, by reason of the negligence of the defendants, in 1905.

E. F. B. Johnston, K.C., and R. McKay, for plaintiffs.

D. E. Thomson, K.C., and A. J. Thomson, for defendants.

MACMAHON, J.:—The writ of summons was issued on 27th December, 1905.

On 24th September, 1907, an order was made by consent of the parties whereby John J. MacCracken, executor of the will of Mrs. Lumsden, who was executrix of the will of Alexander Lumsden, deceased, and John R. Booth were added as parties plaintiffs, on the terms, as to the right or claim of the added plaintiffs, that the action should be deemed to have been commenced on the date of their being added as parties, and that there should be open to the defendants, as against such added plaintiffs, all defences which would have been available to the defendants had the action been brought on the date of the adding of these plaintiffs.

The plaintiffs were the owners of what has been called "the Gillies timber limit," consisting of 50 square miles on the Montreal river in the rear of Lake Temiskaming.

The license for that limit was first issued in January, 1867, to D. T. Brown; then by several mesne transfers acquired by Gillies Brothers in 1882, and continued to be issued to them up to the season 1899-1900, when it was transferred to the Gillies Brothers Company Limited, and the license was issued in the company's name down to the season of 1906-7.

This limit the plaintiffs sold in Feb

A license was first issued to the late Alexander Lumsden and John R. Booth in 1878 for berth 33 on the Montreal river, containing 100 square miles; and the Gillies limit to the south-east. During the life of Alexander Lumsden the license was each year renewed by Alexander Lumsden and John R. Booth. After Alexander Lumsden's death the licenses were issued by John R. Booth. Of the late Alexander Lumsden and John R. Booth the evidence at the trial it is referred to as the "Gillies and Booth limit."

By an agreement dated 15th February 1905, that Margaret Lumsden, the executrix of the late Alexander Lumsden, holds an undivided two-thirds interest in the limit known as berth 33, situated on the Montreal river, containing 100 square miles; and she undivided one-third interest held by John R. Booth, and transferred to her, and she agrees to sell the same to the plaintiff for \$515,000. The terms of the agreement are fully set out in the agreement, the purchase price of \$123,333, being payable in 3 years from the date of the agreement; and the buyers have the right to cut the timber from the date of the agreement. (Mrs. Lumsden) is to hold the license in fee simple till fully paid the whole amount of the purchase price.

Both the Gillies limit and the Lumsden limit extend for a considerable distance along the river, and operated by the defendants, the railway limits.

Paragraph 9a of the statement of claim against the defendants were guilty of negligence in the accumulation of cut timber, brush and flammables, to remain upon the right of way, and failed to keep the same clear so as to prevent starting or spreading on and from the same. It is also charged that the defendants in operating the railway caused fire to be set to the timber property of the plaintiffs, on the said limit, in the month of July, 1905, whereby a large quantity of property was burned and otherwise

[The learned Judge made a full summary of the evidence and proceeded:—]

I find it was by reason of the failure of the defendants to remove the combustible material from the railway lands that sparks from the railway engines of the defendants caused the fires which resulted in the destruction of the timber on the said limits at mile 92 on 30th May, at mile 90 on 9th June, and at mile 96 on 1st July, 1905.

By the Crown Timber Act, R. S. O. 1897 ch. 32, sec. 3, sub-sec. 1, it is provided that the licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established; and, by sub-sec. 2, the licenses shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof, &c.

By clause 11 of the Crown timber regulations of April, 1865, "all timber licenses are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for and issued before the 1st of July following the expiration of the last preceding license, in default whereof the right to renewal shall cease, and the berth or berths shall be treated as forfeited."

"12. No renewal of any license shall be granted unless and until the ground rent . . . and all dues to the Crown for timber, saw logs, or other lumber cut under and by virtue of any license other than the last preceding, shall have been paid."

An order in council passed on 17th November, 1898, provided: "Whenever such ground rent may have remained unpaid for 3 years from the date of the expiry of the last license issued or renewed, the Minister . . . may declare such berth or berths forfeited, and thereupon the right of renewal of the license to the same shall cease."

The licenses give to the licensees full power to cut the timber described therein upon the location from the date thereof to 30th April, and no longer.

On 30th June, 1905, E. J. Darby, the Crown timber agent at Ottawa (within whose district plaintiffs' limits are) wrote to the plaintiffs acknowledging receipt of cheque "for

\$1,641, amount for renewal of ground your license for current season," and due by them for timber dues, "and costs stands against you in the books here of your licenses for current season."

The plaintiffs on 3rd July, 1905, paid license for the Gillies timber limit sh within a few days thereafter. The ground and Booth limit was not paid until the license was then sent from the Commission by the Commissioner, but was 13th December, 1905.

Although the plaintiffs might have of the licenses for the season of 1905-6, of the limits until payment of the ground remaining unpaid for timber dues, right to cut the timber on the Gill after 3rd July, 1905, when such payment 6th July in respect of the Lumsden and they would be entitled to renewals of

[Reference to *McArthur v. North R. W. Co.*, 15 O. R. at p. 737, 17 Mowat, Attorney-General, in reporting Scott Estate in 1876, Sessional Papers IV., 1876, p. 8; *Smylie v. The Queen* 188.]

As the statute gives no right to the Crown could, on 30th April, in a licenses and withdraw the limits altogether area, notwithstanding the order in 1898.

There were no licenses in existence occurred for which damages are claimed the timber while standing belonged to plaintiffs' right to cut was only during respective licenses, and there being no cannot recover.

Action dismissed with costs.

MAHON, J.

DECEMBER 4TH, 1907.

TRIAL.

LIES BROTHERS CO. LIMITED v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION (No. 2).

Government Railway—Liability for Nonfeasance—Destruction of Timber—Negligence.

Action for damages for timber burnt upon the limits of the plaintiffs, as alleged, by reason of negligence of defendants in 1906.

C. F. B. Johnston, K.C., and R. McKay, for plaintiffs.

D. E. Thomson, K.C., and A. J. Thomson, for defendants.

MACMAHON J.:—The writ of summons was issued on December, 1906. The pleadings are a repetition of the facts in action No. 1, between the same parties, except that the damages claimed are in respect to a fire alleged to have been caused by an engine of defendants setting fire to combustible material allowed to remain on the right of way, and in so communicating to and destroying portions of the timber on the limits of the plaintiffs (described in action No. 1), on the 10th July, 1906.

There was issued to the representatives of the late Alexander Lumsden and to J. R. Booth a license from 9th July, 1906, to 30th April, 1907, to cut on the 100 square acres on the Montreal river. The ground rent was paid by the plaintiffs. A license was also issued to the plaintiffs by the Gillies timber limit, covering the same period.

Mr. Aubrey White, the Assistant Commissioner of Lands and Forests, produced a map shewing the proclaimed fire limit, and that the timber limit in question is within the boundaries of the district.

Synopsis of evidence].

It is found that the fire in question was caused by a spark or sparks emitted by engine 101 falling on the combustible material which the defendants' servants negligently per-

mitted to accumulate and remain on the railway.

The Act incorporating the defunct railway, ch. 9, the preamble to which recites that the province has shewn that in the Nipissing and Lake Abitibi, and near Temiskaming, there are large areas of extensive tracts of pine and deposits which are expected on development to be the wealth of the province, and the distance and it is in the public interest to bring into communication with the existing lines that for this purpose a railway should be operated under the control of the province from near North Bay to a point on Lake

"1. This Act may be cited as the Northern Ontario Railway Act."

Section 2 provides that the Lieutenant-Governor in council may appoint not less than 3 non-resident members to a board of commissioners for the purpose of supervising the construction of the railway. The provisions of the Act relating to the commissioners shall be a body corporate and shall have the name "The Temiskaming and Northern Ontario Railway Commission."

"3. (1) The commission shall, under the authority of the Lieutenant-Governor in council, construct a continuous line of railway from North Bay to Temiskaming, in a line not less than 100 feet from the town of North Bay and not less than 100 feet from Temiskaming."

"8. The commission, subject to the approval of the Lieutenant-Governor in council, shall have the power to acquire, construct, maintain, operate, and manage the said railway and works, in addition to the powers, rights, remedies, and immunities conferred on the railway company by the Railway Act."

Section 12 provides that the commission may borrow money and may be authorized to raise money for the construction and maintenance of the railway.

Sub-section 3 of sec. 12: "The Lieutenant-Governor, by order in council, may authorize the commission to do all such things as may be necessary for the principal and the interest of the province."

Section 13, sub-sec. 3, directs the commissioners to "provide a sinking fund at such rate per cent. per annum on the entire amount of the debentures issued as aforesaid as will discharge the principal of the said debentures at the maturity thereof."

"(4) . . . The income then remaining shall be paid over by the commissioners to the Treasurer of Ontario at such times and in such manner as the Lieutenant-Governor in council directs, and shall thereupon form part of the consolidated revenue fund of the province."

The railway commission is therefore a department of the Government, and commissioners were appointed under the Act for the management of that part of the government business, "and are not responsible for the neglect or misconduct of servants, though appointed by themselves in the business. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them." See the judgment of Lord Wensleydale in *Mersey Docks Co. v. Gibbs*, L. R. 1 H. L. at pp. 124-5. . . .

[Reference also to *Graham v. Commissioners of Niagara Falls Park*, 28 O. R. 1; *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400; *Municipality of Pictou v. Geldert*, [1893] A. C. 524; *Quebec v. The Queen*, 2 Ex. C. R. 252; *The Queen v. McLeod*, 8 S. C. R. 1; *The Queen v. McFarlane*, 7 S. C. R. 216; *Gibbons v. United States*, 8 Wallace 269; *Attorney-General for Trinidad v. Bourne*, [1895] A. C. 83—distinguishing this last case.]

In the case in hand, what the evidence discloses is that the dead and rotten wood, chips, dry grass, leaves, and brush, were allowed by the servants of the commissioners to remain on the right of way during the summer months, which was merely nonfeasance.

The parties have settled the causes of action set out in paragraph 1A of the prayer to the statement of claim. And the counterclaim of the defendants having also been settled, there will be judgment for the defendants dismissing the claim as to the other causes of action, with costs.

DIVISIONAL COURT

REX v. BOOMER

*Liquor License Act—Conviction of H
Liquor in Prohibited Hours—Sub
Bar-tender for same Offence—Inva
tion—Validity of Earlier—Statut
gard to Sales in Prohibited Hour
Purposes—Necessity for Negativin
tion—Information — Burden of P
Powers of Court—Appeal from
viction.*

An appeal by the Crown, under s
License Act (R. S. O. 1897 ch. 245)
Judge of the District Court of Musk
tion of the defendant, upon an inform
hotel-keeper of the Royal Muskoka ho
Medora, he did illegally sell or dispose
hours of 7 o'clock p.m. on Saturday 1
6 o'clock on the Monday morning f
charging that he had been previously,
1906, convicted of a like offence.

J. R. Cartwright, K.C., for the Cro

J. Haverson, K.C., for defendant.

The judgment of the Court (FAL
LIN, J., RIDDELL, J.), was delivered by

ANGLIN J.:—An information was
O'Connor, a licensed bar-tender at the
charging him with unlawfully selling o
sold at the said hotel between the hou
Saturday 10th September, 1907, and 6
ing Monday morning.

The date charged in this latter infor
a mistake, and was intended to be 10th
appears by indorsement made upon t
District Court Judge.

It is conceded by Mr. Cartwright that the evidence would warrant a contention that separate or different sales of nor were referred to in the two informations.

Mr. Haverson frankly accepted Mr. Cartwright's statement that the defendant Boomer was first tried and convicted, that O'Connor was subsequently tried and convicted, by magistrate, upon the same evidence which had been taken against the defendant Boomer. The District Court Judge, on these circumstances, held that the convictions both of the present defendant and of O'Connor must be quashed as in contravention of sub-sec. 2 of sec. 112 of the Liquor License Act, which permits the prosecution of the occupant of the premises (i.e., the proprietor or license-holder) and the actual vendor (i.e., the person actually selling), separately or jointly, but provides that "both of them shall not be convicted of the same offence, and the conviction of one of them shall be a bar to the conviction of the other of them therefor."

As to the conviction against O'Connor, this order was undoubtedly right. But, the defendant Boomer having been convicted before O'Connor was tried, the fact that O'Connor was subsequently tried and convicted cannot affect the validity of the conviction already recorded against the defendant Boomer. The order of the Judge, therefore, could not be sustained upon this ground.

Mr. Haverson, however, points out that in sec. 54 of the Liquor License Act (6 Edw. VII. ch. 47, sec. 13), prohibiting sales of liquor in licensed premises between 7 p.m. on Saturday and 6 a.m. on the following Monday, sales to persons presenting a requisition that liquor is required for medicinal purposes, signed by a duly qualified medical practitioner, or justice of the peace, are excepted.

The Court of Common Pleas in *Regina v. White*, 21 C. P. (a decision which stands unquestioned) held that a conviction under the corresponding section of 32 Vict. ch. 32, which omitted to state that the liquor had not been supplied upon a requisition for medicinal purposes, was bad, and the conviction was accordingly quashed. At the date of that decision there was in force a provision corresponding with the present sec. 717 of the Criminal Code, which enacts that if the information negatives any exception in the statute under which the same is founded, it shall not be necessary for the prosecutor to prove such negative, but the defendant may rely on the affirmative thereof in his defence.

In the present case the information did not contain the exception contained in sec. 54. The conviction is against us, but Mr. Haverson contends that we must assume it followed the information. If the defect were merely in the conviction, it could probably be remedied under the Ontario statute 2 Edw. VII. ch. 12, which makes applicable to convictions under the Ontario Summary Act all the provisions of the Criminal Code of Canada in amendment of convictions or orders, both upon appeal and on their removal by certiorari. Section 754 of the Criminal Code enables the appellate court, on appeal from a conviction by a justice of the peace, to dispose of the appeal or order complained of on the merits, "notwithstanding any defect in the conviction or order."

But the jurisdiction conferred by this section cannot be exercised where the evidence before the court fails to disclose the offence of which, by the amendment of the conviction, it is sought to declare the defendant guilty.

In the present case the information did not contain the exception in sec. 54 of Liquor License Act, prohibiting the sale to vendees holding requisitions for the purchase of liquor for medicinal purposes. Therefore, the provisions of the Criminal Code casting upon the defendant the onus of proving affirmatively that he was within this exception do not apply. The burden was upon the prosecutor to establish evidence that the sale in respect of which the charge was made was not within the exception of sec. 54. There was no evidence whatever before the magistrate upon this point. The conviction follows the information, and is, therefore, valid. If defective, it cannot be rectified; if the conviction is valid, the information and purports to negative the exception, and is no evidence to support it. In either case the conviction, if upheld, must, upon this ground, be upheld.

Although the magistrate, in the course of his judgment before him, might, subject to the provisions of sec. 754 of the Liquor License Act, have amended the information by adding a clause negating the exception in sec. 54, it would be contrary to every rule to permit such an amendment. If made, the effect of which would be to dispense with the necessity of the prosecutor proving what he would otherwise be bound to prove in order to establish the offence. There is no statutory provision authorizing a court to amend a conviction in a perverse of natural justice.

The appeal must, therefore, be dismissed.

CARTWRIGHT, MASTER.

DECEMBER 5TH, 1907.

CHAMBERS.

McALPIN v. RECORD PRINTING CO.

Libel—Pleading—Statement of Claim—Irrelevant Allegations—Motion to Strike out.

Motion by defendants to strike out paragraphs 6 and 8 and the concluding words of paragraph 10 of the statement of claim "as irrelevant and likely to prejudice the fair trial of the action."

A. G. Ross, for defendants.

N. Sommerville, for plaintiffs.

THE MASTER:—The plaintiffs allege that they have been libelled by the defendants, as is set out in a statement of claim of about 30 folios in length. From this it appears that the McAlpin Tobacco Co. in 1902 amalgamated with the Consumers Tobacco Co. The operations of the new company were unsuccessful, and many farmers and tobacco growers who had purchased stock in the new venture were extremely aggrieved, and formed a combination to defend over 100 suits threatened to enforce payment of notes given by them in payment of shares so purchased.

A test action was tried at the County Court sittings at Sandwich on 12th June and two following days, and while judgment was reserved, on 15th June, the defendants published the first of the libels complained of, laying the blame of the failure of the venture on "Gen. McAlpin's crowd," through a "most deliberate and cold blooded 'freeze out' successfully worked by the McAlpins," and seeking to exonerate those who had been interested in the Consumers Co. Three days later this was repeated in the weekly issue of the Record.

About two months later judgment was given in the County Court action in favour of the defendant, and then the Record published a notice of this, of which the plaintiffs also complained. This was repeated as before in the weekly issue of 3rd September, and on 10th September the plaintiffs wrote requesting an apology. This was refused.

as set out in 10th paragraph of statement of claim, in a letter of 14th September, "in language which added insult to the injury complained of." It is against these words that the defendants move, but they may surely be taken as an assertion by the plaintiffs that they intend to use this letter as proof of malice in fact, and, in my opinion, they are unobjectionable as a matter of pleading.

The 6th paragraph of the statement of claim is 7 or 8 folios in length. It gives a history of the amalgamation, and accounts for the failure of the new company by alleging misapplication by the members of the Consumers Co. of the money of the new company, who used it to pay their own debts, and that then these gentlemen, to replace such moneys, sold shares in the new company to the farmers and tobacco growers in the county of Essex and the adjacent counties. It then speaks of the trial of the County Court case, and in the 8th paragraph states that defendants were present thereat and knew that the evidence given shewed that the charges made against the plaintiffs "were wholly false and without the least foundation in fact."

In support of the motion the case of *Hay v. Bingham*, 5 O. L. R. 224, 1 O. W. R. 822, was cited. That, however, does not seem to me to be in point. These paragraphs 6 and 8 are not in any sense a "glorification of the defendants by themselves;" on the contrary, they give an account of the whole matter which plaintiffs contend shews that the defendants have done what they did with a desire to injure the plaintiffs and shield those who had been in the Consumers Co.; and that they will, therefore, not be able to plead that the articles complained of were no more than fair comment on matters of public interest, etc.

As in the case of the concluding words of paragraph 10, these paragraphs 6 and 8 also set out very fully and clearly the grounds on which the plaintiffs will rely to shew express malice. They do not seem to be in any proper sense of the words "irrelevant or likely to prejudice the fair trial of the action."

In my opinion, the motion should be dismissed with costs to the plaintiffs in the cause.

RIDDELL, J.

DECEMBER 5TH, 1907.

WEEKLY COURT.

CANADIAN PACIFIC R. W. CO. v. FALLS POWER CO.

Injunction—Motion for Interim Injunction—Electric Wires—Dangerous Proximity to Others—Danger to Employees of Electrical Companies—Danger to Public—Induction—Leave of Town Corporation—Prima Facie Case—Continuance of Injunction—Terms—Speedy Trial—Costs.

Motion by plaintiffs to continue an interim injunction restraining the defendants from erecting poles and stringing wires upon a certain street in the town of Welland.

Angus MacMurchy and A. D. Armour, for plaintiffs.

W. E. Middleton, for defendants the Falls Power Co.

W. H. Blake, K.C., for defendants the Ontario Power Co. of Niagara Falls.

RIDDELL, J.:—The plaintiffs have a telegraph line (with some 8 wires) running through the town of Welland. On Hellem's avenue these wires are on the same poles as the wires of the Bell Telephone Co. (some 14 in number.) For a distance on the west side of the avenue these poles are placed on the inside of the sidewalk, and the Falls Power Co. or their co-defendants have poles also on the west side of the avenue, but on the outside of the sidewalk. At Division street the line of the plaintiffs and the Bell Telephone Co. crosses over to the east side of Hellem's avenue, and on that side runs on the inside of the sidewalk, leaving the outside free. Until recently there were no other poles on the east side of Hellem's avenue, but a few days ago the defendants the Falls Power Co. began erecting poles on the east side of the avenue, two of them, as their own manager swears, in a line with the plaintiffs' poles and projecting through the telegraph and telephone wires. There is some dispute as to the distance these poles go above the present poles, and also as to the amount of "clearance" of the wires—the plaintiffs contending that the amount of clearance will at the most be not more than 3 feet, while the defendants' electrician swears to 10.

The plaintiffs, asserting that the intention was to string wires along these poles and to carry electricity at a very high

voltage (some 22,000 voltage is alleged), applied to the Chancellor and procured an injunction. As the plaintiffs were unable to discover which of the two defendant companies was really doing the acts complained of, an injunction was obtained against both. Upon a motion to continue the injunction, the Ontario Power Co. shewed upon affidavit that they were innocent, and by consent the motion was turned into a motion for judgment as against them, and the action dismissed as against them with costs.

As against the Falls Power Co. the plaintiffs set up that the existence of a line carrying a high voltage, and situate as it is intended the line of that company shall be, will cause grave danger to the employees of the plaintiffs working on or about their lines and poles—and also that the lives of employees working miles away would be endangered in case of a wire breaking. Moreover, it is asserted that great damage might be done to the property of the plaintiffs by such an accident—and that in any case induction may be expected sufficient to seriously interfere with the operation of their telegraph line. They also point out that there is no good reason for the defendants not taking the other side of the sidewalk and keeping away from their poles altogether.

The defendants allege that they have a "franchise" from the town of Welland, the poles to be placed where directed by the street committee of the town; that their poles are being put up "with the consent of the chairman of the street committee;" that the likelihood that the wire they propose to put up will break is small; and there will be no induction whatever.

Upon the argument it was agreed that I might use such scientific knowledge as I had—acquired from any source—and I have accordingly looked at certain works of authority. In view of the disposition I propose to make of this case, I did not think it proper to do more than make a somewhat superficial examination of the question of induction. So far as my investigation has gone, I am not at all satisfied—but the reverse—that there will be no induction, and that that induction, considering the relative voltage of the currents, may not be of a very disturbing character. If that be the case—and for the purposes of this motion I hold that a *prima facie* case has been made out—the fact that the leave of the town has been obtained might not be of importance.

In *Ottawa Electric Co. v. Consumers Electric Co.* (Supreme Court Cases, vol. 249, in Library) both parties had obtained the leave of the City of Ottawa to string their poles, and the poles of the defendants had been placed precisely where the city engineer directed, but, nevertheless, the trial Judge . . . ordered the removal of all poles and wires of the defendants within a stated distance of the wires of the plaintiffs. This judgment was modified in the Court of Appeal, 14th September, 1903, but in a sense adverse to the defendants, and the Supreme Court dismissed an appeal from that judgment.

But there is another ground upon which the injunction should clearly be continued. *Salus populi suprema est lex*; and the maxim is applicable to the individual as well as to the body politic. Nothing should be permitted which will unnecessarily endanger the lives of the people. We experience a feeling of horror when some poor fellow is hurried into eternity — surely everything should be done in advance to prevent such occurrences. From cases such as *Randall v. Ahearn* it is well known that repairers and others are likely to be killed or injured by these high voltage currents; it is well known from such cases as *Findlay v. Hamilton Electric Light Co.* that wires, even such as are used for the carriage of electricity of high voltage, will sometimes break, with terrible consequences. Sometimes, upon such wires breaking, those many miles away are killed or injured.

Commercial necessity is pleaded for permitting such construction. "Commercial necessity" sometimes, indeed generally, means saving of money; and that plea should only be given effect to as against the protection of the innocent from danger in the clearest case.

The leave of the town has not been proved on the material before me—if the direction of the street committee was to govern the position of the poles of the defendants, that direction does not seem to have been obtained—all that is alleged is the consent of one member of that committee.

It may be that at the trial the defendants may be able to displace the *prima facie* case of the plaintiffs; or it may be that the law will be shewn to be such as that they have a legal right to do as they propose, dangerous though it may be—but for the purpose of this motion I think the defendants have failed.

But, while the injunction should be continued, the defendants have a right to have a speedy trial. No greater obstacle should be put in the way of a commercial enterprise such as this than is necessary to protect the rights of others. There is no reason why the whole case may not be disposed of in a week. There are no complications; the facts are simple; expert evidence, if required, can be procured in a few days, or indeed hours; elaborate pleadings are not necessary; and examinations for discovery, etc., would be superfluous.

I shall direct the plaintiffs to bring the action on for trial before myself at the Toronto non-jury sittings on Thursday 12th December, 1907, at 9.30 a.m. . . . The plaintiffs will deliver a statement of claim before 1 p.m. of Saturday 7th December, and defence is to be delivered by 1 p.m. of the Monday following. Neither party need give notice of trial.

The injunction will be continued until 9.30 a.m. of Thursday 12th December, 1907, and until such time as the action directed by this order then to be tried is disposed of. If the plaintiffs do not accept the terms of this order, and proceed to trial accordingly, the injunction will be then dissolved, unless otherwise ordered; if the defendants do not accept the terms of the order, the injunction will be continued till the trial generally.

In any case the costs of this motion will be costs in the cause to the successful party, unless the trial Judge otherwise orders.

TEETZEL, J.

DECEMBER 5TH, 1907.

TRIAL.

KITTS v. PHILLIPS.

Master and Servant—Injury to Servant—Negligence—Contractor—Sub-contractor—Independent Contractor—Foreman—Evidence—Partnership—Contributory Negligence—Damages.

Action under the Workmen's Compensation Act to recover damages for injuries sustained by plaintiff while engaged upon railway construction work.

Peter White, Pembroke, for plaintiff.

W. L. Haight, Parry Sound, for defendants Phillips & Co.

F. R. Powell, Parry Sound, for defendants Montgomery and Maybee.

TEETZEL, J.:— . . . Plaintiff was engaged in drilling rock in the construction of a branch of the Canadian Pacific Railway near Parry Sound. While he was so engaged at the bottom of a deep cut, a large rock, which was on the side of the cut and above where the plaintiff was working, became loosened and rolled down the bank and upon the plaintiff, causing him very serious injury. The plaintiff was in the employment of the defendant Montgomery, who, I find upon the evidence, was an independent contractor under the defendants Phillips & Co. The plaintiff sought to establish that defendants Phillips & Co. were the real employers, and as such liable for any negligence of Montgomery or Maybee, but the evidence falls short of such purpose, and the action as against them must be dismissed with costs.

I give credence to the evidence of the witness Murdoch Watts, and find that the accident was occasioned by the falling rock as described by him. I do not credit the defendant Maybee in his evidence describing a rock which a few minutes before the accident he says was examined by him and Montgomery and found to be immovable, and attributing plaintiff's injury to its subsequent fall, in some way which he does not explain. The rock which caused the injury was, I think, thrown upon the side of the cut by the force of a blast. It was the duty of Maybee, as Montgomery's foreman, to see to the removal of all loose or overhanging rocks from the sides of the cut, so that workmen below might not be injured by their fall. I find that by his negligence the rock which injured plaintiff was not removed, and that both he and Montgomery, his employer, are liable in damages to plaintiff.

Plaintiff endeavoured to establish a partnership between Maybee and Montgomery, but in this I think he has failed. Plaintiff's counsel applied to amend by charging liability against him as a negligent foreman, and this I would allow.

I find the plaintiff was not guilty of contributory negligence.

I assess plaintiff's damages at \$1,200, and direct judgment to be entered in his favour against defendants Montgomery and Maybee for that sum and costs.

NOVEMBER 12TH, 1907.

DIVISIONAL COURT.

BELLEVILLE BRIDGE CO. v. TOWNSHIP OF
AMELIASBURG.

*Assessment and Taxes—Toll Bridge over Navigable Water—
Highway Connecting Municipalities—Interest of Bridge
Company Assessable in Township in which one Half Situ-
ate.*

Appeal by plaintiffs from judgment of BOYD, C., ante
571.

E. G. Porter, Belleville, for plaintiffs.

W. S. Morden, Belleville, for defendants.

The judgment of the Court (MEREDITH, C.J., MAC-
MAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—This case has been very fully and ably
argued, but we think as to the main point it is concluded by
authority binding upon us, and that nothing would be gained
by reserving judgment.

The action is brought by the appellants, who were assessed
by the municipality of Ameliasburg in respect of that portion
of a bridge—a toll bridge which they had erected across the
waters of the Bay of Quinte—situate within the township of
Ameliasburg. They have paid taxes on that assessment, and
now sue to recover back the amount paid, alleging that the
bridge was not liable to taxation, and that the rate was there-
fore wrongly imposed, and that they are entitled to get what
they have paid returned.

The bridge was erected, as I understand, by the Bay of
Quinte Bridge Company, which was incorporated by Domi-
nion Act of 1887, 50 & 51 Vict. ch. 97. By that Act the cor-
poration was created; and by sec. 2 it is provided that "the
company may build and complete a bridge across the Bay of
Quinte aforesaid, from the points aforesaid, for ordinary
traffic purposes, and may erect and construct toll gates, and
construct, complete, and maintain the necessary approaches
to the said bridge, and may also do and execute all such other
matters and things as are necessary to properly equip and

maintain the said bridge in a proper and efficient manner—and for the said purposes may acquire, purchase, and hold such real estate as is requisite for all the said purposes.”

Then there is provision that the company should not commence the bridge until the plan had been approved by the Governor in council (sec. 3); then by sec. 4 the bridge is to be provided with “a draw or swing so constructed as to have not less than 100 feet space for the free passage of vessels, steamboats, rafts, and other water craft, which draw or swing shall, at all times, be worked at the expense of the company so as not to hinder or delay unnecessarily the passage of any such vessels, steamboats, or rafts, or water craft; and during the season of navigation the company shall maintain from sundown to sunrise suitable and proper lights upon the bridge to guide vessels, steamboats, and other water craft approaching the draw or swing thereof.”

By 62 & 63 Vict. the plaintiffs were incorporated. It appears that there was some difficulty about their purchasing the rights of the Bay of Quinte Company, and the Act was passed to enable that to be done.

The Act is very much in the form of the other Act, except that sec. 7 provides that the company “may acquire the bridge now constructed across the Bay of Quinte from a point at or near the city of Belleville, in the county of Hastings, to a point on the opposite shore of the said Bay of Quinte in the township of Ameliasburg, in the county of Prince Edward, and the approaches thereto, and may maintain, use, and operate the same for ordinary traffic purposes, and may construct and maintain toll gates and other necessary buildings in connection with the working of the said bridge.”

The effect of this regulation undoubtedly was, in my judgment, to confer a perpetual right in the nature of an easement upon the company to construct and maintain the bridge across the navigable waters of the Bay of Quinte.

In the construction of it, they built an embankment leading up to the superstructure crossing the waters, part of which is said to have been upon private property. The piers which supported the superstructure were built into the soil below the waters of the bay, and it seems to me quite clear that the effect was at least to confer upon the plaintiffs an easement in the soil of the Crown in perpetuity. If the property had belonged to an individual, and a similar right had been conferred by deed, it would undoubtedly have conferred

that easement, if indeed it be not a higher right than an easement. It is unnecessary to determine whether a right in the portion of the soil occupied and an easement as to the rest of it, or an easement as to the whole, is conferred: it is sufficient for the purposes of this case if it is an easement.

Then the question is, what is the effect of the Assessment Act? The principle of the Assessment Act, 4 Edw. VII. ch. 23, is embodied in the section (sec. 5) which provides that all real property shall be liable to taxation.

Now, what is real property? The Assessment Act contains this definition (sec. 2 (7)): "'Land,' 'real property' and 'real estate' shall include:

- " (a) Land covered with water;
- " (b) All trees and underwood growing upon land;
- " (c) All mines, minerals, gas, oil, salt, quarries and fossils in and under land;
- " (d) All buildings, or any part of any building, and all structures, machinery, and fixtures, erected or placed upon, in, over, under, or affixed to, land;
- " (e) All structures and fixtures erected or placed upon, in, over, under, or affixed to any highway, road, street, land, or public place or water, but not the rolling stock of any railway, electric railway, tramway, or street railway."

This bridge was clearly constructed, erected, or placed upon, in, over, under, or affixed to a highway or water, so that it comes within the very words of the definition.

By the Consolidated Municipal Act, 1903, in sec. 2, paragraph 8, it is provided that "land," "lands," "real estate," "real property," shall include "lands, tenements, and hereditaments, and any interest or estate therein, or right or easement affecting the same;" and by a provision of the Interpretation Act, R. S. O. 1897 ch. 1, sec. 10 (I have not the present Act before me, but the provision is the same in it) "the interpretation section of the Municipal Act, so far as the terms defined can be applied, shall extend to all enactments relating to municipalities."

Therefore we have the words "real property" including an easement, which it did not, as was held, before the amendment was introduced containing those words, and we have the structure over water which is "real property" within the meaning of the interpretation section of the Assessment Act.

Then, in order to escape this burden imposed by the general provision that all real property shall be liable to

taxation, it is incumbent upon the appellants to shew that the bridge comes within one or other of the exemptions mentioned in the Act.

Mr. Porter argues, in the first place, that this is land vested in the Crown, or land vested in some person in trust for the Crown, and that it therefore comes within the first exemption contained in the Assessment Act.

It is to be noted that in the last Assessment Act a change was made in the section dealing with property vested in the Crown. The former Acts provided that "all property" vested in the Crown should be exempted from taxation, but that when real property of the Crown was occupied by others than servants of the Crown, the interest of the occupant should be liable to taxation. The language now is, "the interest of the Crown in any property," so that it leaves the interest of any person else not holding for the Crown, or in trust for the Crown, liable under the general words of the statute.

Mr. Porter further argues—it is very difficult for me to follow the argument—that the plaintiffs are agents or trustees for the Crown, but they are certainly not in that position. They have conferred upon them, as I have already pointed out, a right in perpetuity to maintain the bridge, a property right in the soil, and a right, subject to certain conditions, over the waters of the bay, and in no sense can they be said to be trustees for the Crown within the meaning of the exemption.

Then it is said that sec. 37 of the Assessment Act in express terms excludes from liability to assessment this bridge, because it is a bridge over 100 feet in length.

I adopt entirely the view of the learned Chancellor, which is expressed in these words, in the report of the case, ante at p. 572:

"Section 37 of the Act has no application to this case, for here the property, though over a mile in length, is nothing in its totality but a bridge. That section applies only to a long bridge forming part of a toll road. It matters not that the Bay of Quinte, over which the bridge passes, is navigable water, forming in law a public highway; this bridge gives another right of way of legalized character, obtainable upon payment, over that water, without interfering with the absolute public rights of passage and navigation." The only word that I do not adopt is the word

"long;" I do not think that it is necessary that the bridge should be long, and I do not think that the Chancellor so intends.

The next question is: Is the bridge exempt from taxation because it is a public road or way within the meaning of the 5th paragraph of sec. 5 of the Assessment Act? It is unnecessary for us, I think, to discuss that phase of the case or enter into an elaborate inquiry as to the meaning of the paragraph, because there are three decided cases binding upon us and which are fatal to the appellants' case, so far as it depends upon exemption under that section.

The first case arose in 1869, Niagara Falls Suspension Bridge Co. v. Gardner, 29 U. C. R. 194; the same provision exempting a public road and way existed in the Assessment Act then in force as in the Act now in force; the bridge there was a suspension bridge hung from buttresses erected upon soil upon the Canadian and United States sides respectively of the Niagara river; the water between was a river under the jurisdiction and control of the Parliament of Canada, just as the Bay of Quinte in this case is. The Court was of opinion that so much of the bridge as was within the county of Welland was liable to assessment as real estate.

In *Re Queenston Heights Bridge Assessment* (also the case of a bridge over the same river), 1 O. L. R. 114, it was determined that there was a right to assess the bridge; the only question in dispute there being as to the principle upon which the assessment should be made.

Then the third case is *Re International Bridge Co. and Village of Bridgeburg*, 12 O. L. R. 314, 7 O. W. R. 497. That also was a bridge over the Niagara river, similar in its character to the bridge in question here, a toll bridge, a bridge for foot passengers and for vehicular traffic; and it was held that it was liable to assessment.

If it had been a sufficient answer to say that the bridge was a public way and therefore exempt, these decisions could not have been come to; and, as I have said, it seems to me that they are conclusive upon this, the most debatable point apart from authority in the case, and therefore the appellants' case fails and must be dismissed.

NOVEMBER 13TH, 1907.

DIVISIONAL COURT.

BOULTBEE v. WILLS & CO.

Shares—Sale of Shares in Mining Company—Vendors Interfering to Prevent Registration of Transfer—Resale by Purchaser—Loss of Profit—Damages—Obligation to see that Purchaser Registered as Owner.

Appeal by defendants Wills & Co. from judgment of **MABEE, J.**, in favour of plaintiff for the recovery of \$629.75 in an action for damages for preventing plaintiff from carrying out a profitable sale of 1,000 shares of the capital stock of the Temiskaming Mining Co., which had been bought by plaintiff from the appellants, by the appellants obtaining an injunction (in an action to which the plaintiff was not a party) restraining the registrars of the shares from transferring them upon the books of the mining company.

G. M. Clark, for the appellants.

R. McKay, for the plaintiff.

The judgment of the Court (**MEREDITH, C.J.**, **MACMAHON, J.**, **TEETZEL, J.**), was delivered by

MEREDITH, C.J.:—We think that this appeal fails.

The plaintiff purchased on 13th October, 1906, from the appellants 1,000 shares of mining stock for \$700, and received the certificate which had been issued to **M. R. Cartwright** for these shares, with a transfer in blank indorsed on it; and there is no doubt, upon the authorities, that that completed the duty of the sellers of the shares, and that it was not incumbent upon them to see, and they were in no way responsible, that the purchaser should become registered as owner of the shares upon the books of the company; but it is clear upon principle, and if necessary the authority of the Court of Appeal may be cited in support of it (**Hooper v. Herts**, [1906] 1 Ch. 549), that a vendor of shares is under obligation to do nothing to prevent his purchaser having the shares registered in his name.

Owing to some difficulties between the appellants and Cartwright, litigation arose which resulted in an injunction being obtained, first a temporary one, restraining the agents of the company, the Imperial Trusts Corporation, from registering any transfers of shares standing in the name of M. R. Cartwright, to the extent of 9,000 shares. Cartwright, without the 1,000 shares which had been sold by the appellants to the plaintiff, and which still stood in his (Cartwright's) name, had not 9,000 shares standing in his name; therefore the result of the injunction order was that it operated to restrain the transfer agents, the Imperial Trusts Corporation, from registering the transfer to the plaintiffs of the shares which he had bought from the appellants.

No doubt, that was the result of an unfortunate mistake on the part of the appellants, who had no intention of interfering with that transfer; but the terms of the injunction order were plain, and the transfer agents would not have been justified in refusing to give effect to the provisions of it.

The plaintiff placed the shares in the hands of his brokers, Messrs. Jaffray & Cassels, for sale. They found a purchaser at \$1,700. The plaintiff then handed the certificate to his brokers in order that the transaction might be completed. Upon the brokers taking the certificate to the transfer agents for the purpose of having the plaintiff registered as the owner of 1,000 shares and obtaining two certificates for 500 shares each, he was informed by the agents of the injunction order, and they refused to register the plaintiff as owner of the shares. In consequence of this, the plaintiff was unable, or assumed that he was unable, to complete his sale, and he went into the market and bought 1,000 shares for \$1,700, and completed the sale.

The injunction was dissolved after a delay of some weeks, and the plaintiff was registered as owner of the shares, and obtained the certificate, and then sold the shares for \$1,070.25; this action is brought to recover the damages which he sustained by the wrongful acts of the appellants; and the judgment at the trial was for the plaintiff for the difference between the \$1,070.25 and the \$1,700, at which price the plaintiff had sold the shares through his brokers.

The contention of the appellants' counsel, and the only point pressed on the argument, was that the plaintiff had made a complete sale of the 1,000 shares, and that he was

under no obligation to see that his purchaser was registered as the owner of them; that he had done nothing to prevent the transfer to his purchaser being registered, and was not responsible for the action of the appellants in preventing the registration of the transfer.

It seems to us, however, that it is plain upon the evidence that the sale to the plaintiff's purchaser was not complete; that it was a term of the sale that the vendor should be in possession of two 500 share certificates, so that the purchaser might have them in that form; and, if that be so, it follows, as a matter of course, that the plaintiff is entitled to recover, because, upon applying for the certificates, the delivery of which was essential to the completion of the contract, he was unable to obtain them.

I am inclined to think—it is not necessary for the decision of this case to decide—that, even if the evidence on this point were not as clear as it is, the brokers dealing in good faith with a highly speculative class of shares, such as these mining shares undoubtedly were, if, acting in good faith, they formed the opinion that it was so doubtful whether the purchase could be forced upon the purchaser that they ought not to insist on completion at the risk of the principal having to embark in litigation with the purchaser, the plaintiff would nevertheless be entitled to recover. It would be a most unfair thing to him, dealing with a stock of that character, to put him in such a position that he would have to take that risk, or, if he did not, lose his right to recover from the appellants.

No injustice is done to these appellants. If the contention of Mr. Clark is right, and the purchase was completed, the purchasers from the plaintiff would have a right of action for the wrong done in preventing the transfer of these shares to him.

Appeal dismissed.

FALCONBRIDGE, C.J.

DECEMBER 6TH, 1907.

WEEKLY COURT.

RE EAGLE.

Will—Construction—Devise—Estate — Fee Simple Subject to be Divested on Death of Devisee Leaving Children — Rule in Shelley's Case.

Motion by the administrator of the estate of Mary Jane Hards (née McWhirr), deceased, for an order declaring the

true construction of the will of Rebecca Eagle, the material parts of which were as follows:—

“I give and bequeath and devise to my granddaughter Mary Jane McWhirr all that town lot . . . (describing it), subject to a life estate therein to . . . Thomas Eagle, which I grant in said lands to the said Thomas Eagle during his life. I give, devise, and bequeath to my granddaughter Ann Louisa McWhirr my village lot . . . subject to a life estate therein to . . . Thomas Eagle. . . I give and bequeath to my granddaughter Mary Jane McWhirr the sum of \$500 to be paid her when she attains the age of 25 years. . . . And I will and direct that in the event of either of my said granddaughters predeceasing the other and leaving no issue, then that the share of the deceased sister shall go to the surviving sister or the heirs of the surviving sister, but if either of my said granddaughters should die leaving lawful issue, then that the child or children of the deceased should inherit the share of the deceased mother. . . . And I give and devise to my said granddaughters Mary Jane and Ann Louisa all the rest and residue of my estate, real and personal, not otherwise disposed of. And I will and direct that in case both of my said granddaughters should die leaving no lawful issue during the lifetime of the said Thomas Eagle, then and in that case the shares or portions devised to my said granddaughters shall go to the said Thomas Eagle, and that he shall in such event inherit the real and personal property now given and devised to my said granddaughters.”

W. E. Middleton, for the administrator of the estate of Mary Jane Hards.

W. Proudfoot, K.C., for her creditors.

M. C. Cameron, for her infant children.

FALCONBRIDGE, C.J.:— . . . The sale of the lands is confirmed by consent, and the only question is as to the disposition of the money arising therefrom. . . .

The testatrix died 18th December, 1878; Mary Jane Hards died 19th July, 1904, leaving her surviving two children, the above named infants.

It was contended on behalf of the creditors: (1) that the devise was, under the rule in *Shelley's case*, a devise in fee simple; or (2) that it was a devise in fee simple subject to

be divested if Mary Jane died in the lifetime of the testatrix, and that Mary Jane, having survived the testatrix, took the fee simple subject to the devise over to her issue.

For the infants, it was argued that the devise was in fee (subject to the life estate of the husband of the testatrix) subject to the executory devise over in favour of issue (children) of Mary Jane, if she died at any time leaving issue (children).

The rule in Shelley's case does not apply, as "issue" is by the will interpreted to mean "children," who take as personæ designatæ; "issue" is therefore not a word of limitation, as it does not "import the whole succession of inheritable blood:" see per Lord Macnaghten in *VanGrutten v. Foxwell*, [1897] A. C. 658, at pp. 667, 677.

The period at which the gift over must take effect is fixed by *O'Mahoney v. Burdett*, L. R. 7 H. L. 388, which determined that "a gift to X. for life, with remainder to A., and if A. dies unmarried or without children, to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying at any time unmarried or without children." This is subject to the qualification that a contrary intention does not appear by the will. There is no context here which renders a different meaning necessary or proper.

See also *Cowan v. Allen*, 26 S. C. R. 292; *Fraser v. Fraser*, ib. 316; *Crawford v. Broddy*, ib. 345; *VanLoven v. Allison*, 2 O. L. R. 198; In re *Schnadhorst*, [1902] 2 Ch. 234.

Re *Walker and Drew*, 22 O. R. 332, a judgment of my own, is strongly relied on by Mr. Proudfoot. It is distinguishable in this, that it was a case of a devise in fee with a gift over "in the event of death." Death is certain, but it is spoken of as a contingency. In such a case to consider death as a contingency, the will must be read as if the testator had said "in the event of death in my lifetime:" *Jarman*, 5th ed., p. 1564; *Theobald*, 5th ed., p. 575.

There is a distinction, however, when the gift over is on death coupled with contingency, and not merely spoken of as a contingency. This is well shewn in the judgment of Fry, J., in *In re Hayward*, 19 Ch. D. 470, at p. 472, where he

says: "There is, in my judgment, no doubt that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person sub modo (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of the gift over is prima facie to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case there is no reason to confine the meaning of the word "death" to death during the lifetime of the testator, or death during the life of the tenant for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death, which is certain, as a contingency, but when the testator has spoken of death sub modo, that being contingent, there is no need to render it contingent by introducing any limitation." See also Jarman, 5th ed., p. 1574; Theobald, p. 577.

Mary Jane Hards, therefore, took an estate in fee simple subject to be divested in favour of her children on her death, at any time, leaving children.

The estate consequently passed to the children of Mary Jane under the will, and it did not at her death form part of her estate.

Costs to all parties out of the estate.

DECEMBER 6TH, 1907.

DIVISIONAL COURT.

FOSTER v. ANDERSON.

Vendor and Purchaser—Contract for Sale of Land—Construction—Time of Essence—Delay of Purchaser in Tender of Purchase Money and Deeds—Delay of Vendor—Preparation of Conveyance and Mortgage—Misrepresentation by Purchaser's Agent—Statute of Frauds—Misdescription of Lot in Contract—Falsa Demonstratio—Identity of Premises—Deed Held in Escrow—Specific Performance.

Appeal by plaintiff from judgment of RIDDELL, J., ante 531, dismissing an action for specific performance.

A. H. Marsh, K.C., and W. J. Clark, for plaintiff.

G. H. Watson, K.C., for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—Stipulations making time of the essence of a contract are to be construed strictly, and require to be distinct and express: *Hudson v. Temple*, 29 Beav. at p. 543, and *Wells v. Maxwell*, 32 Beav. at p. 414. In the latter case time was made of the essence of the contract in respect of making objections to the title. The Master of the Rolls asks, "Why does the contract say 'in this respect' if it was meant that time should be of the essence of the contract in every other respect? This is distinctly a case in which no time whatever is limited for the performance of the contract:" p. 414.

I think the strict reading of the clause in this contract, "Time shall be of the essence of this offer," means in respect to the offer—the acceptance of the offer—time shall be essential. Does it mean that in respect of all matters and terms contained in the proposal after its acceptance—which then becomes a contract—time shall be equally essential? It does not say so, and if it is ambiguous, the Court leans against its being extended beyond its obvious meaning.

However, I do not find it necessary to place my decision on this ground. Assume that time was made essential as to the completion of the contract, the rule of the Court is that the vendor cannot claim the benefit of the term making time of the essence if he himself has been guilty of laches—if he has failed to bestir himself when he should have been doing, this policy of inactivity may enure to the exculpation of the other side. The Court may then consider that the time element has ceased to be of an essential character, and that reasonable diligence only has to be regarded.

Now, there is a clause of the contract which imposes a duty on the vendor as to the conveyance. It reads: "The deed of transfer is to contain covenant on part of purchaser to pay off said assumed mortgages and to be executed by purchaser (for the purpose of engaging him personally to its payment), and prepared at the expense of the vendor; and

mortgages to be at my (purchaser's) expense." The general rule, in the absence of other provision, is that the purchaser prepares the conveyance at his own expense: *Stevenson v. Davis*, 23 S. C. R. 633. The reason of this is discussed in *Stephens v. De Medici*, 4 Q. B. 427, and Lord Denman, C.J., intimates that the rule seems to be a consequence from the fact that the purchaser is to pay for the conveyance. The language used by Parke, J., in *Prince v. Williams*, 1 M. & W. 13, is now in point, where the instrument (lease) was "to be prepared at the sole expense of the landlord." The learned Judge said: "As the lease was to be prepared at the sole expense of the defendant (lessor), he was to prepare it, and not the lessee. It may be, indeed, that one may be bound by the express terms of a contract to prepare a lease or a conveyance, and yet that it shall be paid for by another, for such stipulations are not inconsistent; but when all that is stipulated for is that it shall be prepared at the expense of the lessor, and there is no context to explain it, it must be intended that the lessor is to prepare it also."

Here the solicitors on both sides understood (and I think rightly) that the vendor was to prepare the deed and the purchaser the mortgage: *Clark v. McKay*, 32 U. C. R. 589. By the time limits of the contract, the acceptance was on 25th September, 1906—10 days were allowed to investigate title, which would bring it to 5th October, and the sale was to be completed on 10th October. Accordingly, on 4th October the plaintiff's (purchaser's) solicitor writes defendant's (vendor's) solicitor a letter asking that a draft deed be submitted, and that as soon as that was done he would submit draft mortgage. No answer being sent by the defendant's solicitor, the plaintiff's solicitor again writes on 8th October enclosing draft mortgage for approval, and repeats the request for draft deed, and hopes to be ready to close on 10th if the deed is executed in time. Still no answer being given, the defendant's solicitor writes a third time on 10th October, enclosing deed to be executed by the vendor, and intimating preparedness to pay the required purchase money at once upon its execution. Up to the time fixed for completion the solicitor for the plaintiff has been thus active and desirous to complete in due course.

But this defendant has done nothing to accelerate the things needful to be done in order to the due completion; con-

current action was contemplated, and was necessary on the part of both solicitors.

The defendant, however, did take action *ex parte* in getting a conveyance executed, but kept this from the knowledge of the plaintiff's solicitor. A deed was sent to the defendant (who was then in Texas) some time in the beginning of October, and was executed by her on 6th October, and was in the hands of the defendant's solicitor about 8th October. The draft of this deed should have been submitted, for, simple though the conveyancing be, the deed is drawn incorrectly in making the \$5,500 payable in cash, whereas part of it, \$4,000, was to be secured by a second mortgage—a prior mortgage to the Messrs. Foster being assumed by the purchaser.

However, this relation of facts justifies the conclusion that the blame for delay rests on the defendant, and not on the plaintiff. It would be "a monstrous injustice" that one who has not complied with a stipulation as to time should seek to enforce the strict observance of it on the other side, who has been diligent. In truth, the essential limit is thus removed, and the course of dealing in completing the transaction rests on the general principles of the Court: *Upperton v. Nicholson*, L. R. 6 Ch. 443.

I think the grounds upon which the learned Judge proceeded in dismissing the action are not tenable.

But on the appeal the defendant sought to support the judgment on two other grounds: (1) that the plaintiff's agent had been guilty of misrepresentation of a material fact; and (2) that there is no contract enforceable, having regard to the Statute of Frauds.

As to misrepresentation, it is not proved. The statement relied on as such was made in a letter by the agent of the vendor and not of the purchaser, and it was a statement of what had occurred, according to his recollection, in an interview with the defendant's solicitor. The trial Judge accredits the evidence of Hill, this agent, and that ends the matter. The real reason why the defendant was desirous to get out of the contract was because the place was better rented than she supposed to be the case when she signed the acceptance.

As to the Statute of Frauds, the objection is that the lot so'd is described as lot 22 in the offer signed, whereas the true lot is No. 24, in Ann street, in the city of Toronto. It is designated as part of park lot 8 and "known as 22 Ann

street," giving metes and bounds. To Hill, the agent, and Dr. Foster, the purchaser, it was "known as" lot 22, whereas it was in truth lot 24. It was an error common to both, and amounts to falsa demonstratio and nothing more. It is easily corrected, and no question of conflict of evidence arises. There is absolutely no doubt that the parties were dealing about the same subject matter, and the identity of the premises is beyond peradventure. . . . Proof of the contract, with proper description of land, and sufficient under the Statute of Frauds, is contained in the deed of conveyance (held in escrow) dated 6th October, which set it forth as subject to the prior mortgage, but which is in error as to the cash payment.

All these things, being in proof, taken together, relieve the written contract from any vagueness or uncertainty. It is needless to go through the cases in detail, but I refer as authorities to *Coote v. Borland*, 35 L. C. R. 282; *Gillatley v. White*, 18 Gr. 1; *Plant v. James*, [1897] 2 Ch. 281; *Clark v. Walsh*, 2 O. W. R. 72. . . . I am aware that *Gillatley v. White* has been suspiciously looked at, but I do not consider its value as an authority impaired. The same holding with reference to a deed in escrow was maintained by a very strong Court in Massachusetts in 1899, of which Holmes, C.J., was the presiding Judge: *Hibbard v. Hatch Storage Co.*, 174 Mass. 296. The result, after consideration of the appeal and what is erroneously termed the cross-appeal, is that the usual judgment for specific performance should be directed with costs of action and appeal to be paid by the defendant, and reference to the Master to settle conveyancing, if the parties cannot agree.

RIDDELL, J.

DECEMBER 7TH, 1907.

CHAMBERS.

RE ROCKLAND PUBLIC SCHOOL BOARD AND ROCKLAND HIGH SCHOOL BOARD.

Schools—Membership of High School Board of Village—Representative of Public School Board—Rural School Section—Union School Section—Village School Board—High Schools Act—Mandamus—Costs.

Motion by the public school board for a mandamus to compel the high school board to admit the representative of the former as a member of the latter board.

W. E. Middleton, for the applicants.

H. M. Mowat, K.C., for the respondents.

RIDDELL, J.:—About 1860 the township council of the township of Clarence, in the county of Russell, set apart a portion of that township as school section No. 2, Clarence. In 1885 a portion of this territory was set apart and erected into an incorporated village, Rockland by name, and thereafter the school number 2 seems to have been known as Rockland public school. In 1905, under the provisions of 1 Edw. VII. ch. 40 (O.), the village of Rockland became a high school district, and a high school has been established accordingly.

In January, 1907, the Rockland public school board, purporting to act under the provisions of sec. 13 (7) of the said Act, appointed Mr. P. as their representative upon the high school board. The high school board refused to allow Mr. P. to take his seat, and the public school board now apply for a mandamus.

No technical difficulties are thrown in the way; and both boards desire a decision on the merits.

The statutory provision to be interpreted is, as mentioned, to be found in 1 Edw. VII. ch. 40, sec. 13 (7)—“Except in the case of a board of education, the public school trustees of every city, town, or incorporated village, in which a high school board is situated, may appoint annually one trustee of and for the high school board,” etc.

Here the high school board contend that the public school board are not, in the sense contemplated by the statute, “the public school trustees of” an “incorporated village;” that their jurisdiction is over a portion of the adjacent township; and that it would not be just that ratepayers quite outside the village should have any part in directing the policy of the high school, as they might if trustees selected by them should nominate a high school trustee who might sway that board or determine its policy. On the other hand, it is contended that the fact that the school section of an incorporated village takes in more territory and includes more ratepayers than those in the village does not make the board any less the board of that village, and should not take away the right of the ratepayers in the village itself.

I do not know that the argument *ab inconvenienti* helps one party more than the other; . . . the words of the statute, reasonably interpreted, must govern. Of course, the right to appoint a high school trustee is a purely statutory right, and those claiming to exercise that right must bring themselves within the statute; but at the same time an unreasonable strictness in applying the statute is to be avoided.

The Act in force at the time of the formation of the village of Rockland was 48 Vict. ch. 49 (O.) That Act, sec. 93, provides that "in case a portion of the territory comprising one or more school sections becomes incorporated as a village or town, the boundaries of such school section or sections shall continue in force and be deemed a union school section, notwithstanding such Act of incorporation, until altered as provided in section 86 of this Act." The language employed is not accurate, but there can be no doubt that what is meant is that the former rural school section becomes a union school section. Upon the formation or incorporation of the village, the school section became then a union school section. The legislation was carried on with a slight change in the language through R. S. O. 1887 ch. 225, sec. 93; 54 Vict. ch. 55, sec. 93; 59 Vict. ch. 70, sec. 49; R. S. O. 1897 ch. 292, sec. 49 (1); and now contained in 1 Edw. VII. ch. 39, sec. 52 (1).

By the Act of 1891, 54 Vict. ch. 55, an amendment was made to this section of the original Act, by adding, "And the provisions of the Act respecting the election of public school trustees in towns or villages shall apply thereto," until such union should be altered or dissolved. This provision was also continued by the subsequent legislation, and is to be found now in the same sub-section of the present Act.

Had it been the intention that the school section so continued should be or be considered a village school section, nothing would have been easier than to say so. This was not done, and the reference to sec. 86 of the original Act makes it plain that such a school section was to be not only called a union school section, but that it should be considered for all purposes as belonging to two municipalities—special provisions being made for voting so that each ratepayer should vote in the same way, and for inspection.

Some assistance may be derived from the markedly different provisions in a case not at all unlike, that is, where any portion of a township is annexed to a city or town. In 1888, by the statute 51 Vict. ch. 28, sec. 40, it was provided that "the portion so annexed shall for all school purposes be deemed to be part of such city or town," subject to a proviso not material to be considered here. This provision was continued by 52 Vict. ch. 36, sec. 43, the proviso being modified; then by 54 Vict. ch. 55, sec. 94. In 1896 the expression "urban municipality" was introduced, defined as being "a city, town, or incorporated village" (sec. 2 (9)), and so the section was changed (59 Vict. ch. 70, sec. 50 (1)), to read, "When any portion of a township municipality is annexed to an urban municipality by proclamation, the portion so annexed shall for all school purposes be deemed to be part of such city or town, provided," etc. This was continued by R. S. O. 1897 ch. 292, sec. 50 (1), *totidem verbis*, and also by 1 Edw. VII. ch. 39, sec. 53.

The distinction between the two methods of dealing with two cases not analogous is striking: in the case in hand the old section continues, but as a union school section; in the other case the part brought into the urban municipality becomes part of the urban municipality for all school purposes. The Act 1 Edw. VII. ch. 39, by sec. 45, provides that all union school sections which existed on 1st April, 1901, should continue to exist—and therefore the school section in question is still a union school section, by whatever name it may be called. That being so, I do not think that the board of trustees are "the public school trustees of" an "incorporated village," within the meaning of the High Schools Act, 1 Edw. VII. ch. 40, sec. 13 (7). They may not necessarily be all or any of them in the village, but that cannot be the test. The only way of arriving at what is meant by the legislation is to find out what is the meaning of the language employed, interpreted reasonably. If my conclusion is opposed to the intent of the legislature, the Act may be easily amended; but with that, of course, I have nothing to do. *

The application must fail.

In regard to costs; there is no suggestion that the plaintiffs are not acting in good faith, the parties on both

sides are public bodies exercising public functions, the case is a novel one, and I do not think that this is a case for costs.

TEETZEL, J.

DECEMBER 7TH, 1907.

CHAMBERS.

PEW v. NORRIS.

*Particulars — Statement of Claim — Contract — Services
Rendered—Sufficiency of Particulars.*

Appeal by defendant from order of Master in Chambers dismissing defendant's application for further and better particulars of the statement of claim.

F. Arnoldi, K.C., for defendant.

Macdonald (Curry, Eyre, & Wallace), for plaintiff.

TEETZEL, J.:—I would have had no hesitation in dismissing the appeal at the close of the argument but for . . . *Gunn v. Turner*, 7 Times L. R. 280. Further consideration of the somewhat meagre report of that case satisfies me, however, that it does not warrant the order asked for here. In that case the agreement sued on does not appear to have been alleged with sufficient particularity, while in this case the agreement sued on is sufficiently identified between the statement of claim and the particulars already served. Then in that case it does not appear that even in a general way did the plaintiff allege the nature of the work and services rendered, while here the plaintiff does allege in his particulars that the work consisted in his going to Ottawa and soliciting the support and influence of several members of Parliament on his behalf, and that as a result of the support and influence so solicited the subsidy was re-voted.

The action is upon an agreement for a lump sum payable on the accomplishment of a certain result, and it is immaterial whether the plaintiff spent days or only hours in

accomplishing it, if he can establish that the result of his and the defendant's joint efforts was success.

What particulars are to be furnished before defence must depend upon the facts of each case. As stated on p. 114 of Odgers on Pleading and Practice, 6th ed., the only general rule that can be laid down is that there must be particulars sufficient to apprise the Court and the other party of the exact nature of the question to be tried.

In this case I think the plaintiff has satisfied this rule, and that the statement of claim and particulars are sufficiently explicit to enable the defendant to properly frame his statement of defence.

Appeal dismissed with costs to be paid by defendant in any event.

DECEMBER 7TH, 1907.

C.A.

RE CONIAGAS MINES CO. AND TOWN OF COBALT.

*Assessment and Taxes—Income Tax—Mining Company—
Surplus from Year's Operations after Paying Expenses—
Distribution in Dividends—"Income Derived from the
Mine"—Assessment Act, sec. 36 (3).*

Appeal by the company from a decision of the Ontario Railway and Municipal Board dismissing an appeal by the company from a decision of the Court of Revision for the town of Cobalt affirming an assessment of the company, in 1907, by the town, for \$100,000 in respect of income from their mines.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. H. Collier, K.C., for the company.

E. D. Armour, K.C., for the corporation of the town of Cobalt.

Moss, C.J.O.:— . . . The company were incorporated in . . . 1906, under the Ontario Companies Act, with a capital stock of 800,000 shares of the par value of \$5 each, and all have been issued and are held as fully paid up. They were issued in the first instance to the proprietors of the mining property in consideration of the transfer thereof to the company. The property consists of 40 acres, area of mine. Mining operations are being carried on, and there are no receipts except from the sale of ore taken from the mine. It is admitted that, after deducting working expenses, there remains a sum of \$100,000, and that if the mine is liable to an income tax, that sum is a reasonable assessment. It is also admitted that dividends have been declared based upon the net receipts ascertained in the manner above stated.

The company contend that the Railway and Municipal Board erroneously held that sum to be "income derived from the mine," within the meaning of those words as employed in sub-sec. 3 of sec. 36 of the Assessment Act. The argument is that, inasmuch as the ore—the product of the mine—represents the capital of the company, every withdrawal is in fact a return of so much of the capital, and therefore, until all the capital has been returned, there can be no income capable of assessment under sec. 36 (3).

English and Scottish cases decided upon the various Income Tax Acts from time to time in force in Great Britain shew that the same argument has been urged against the application of these Acts to somewhat similar instances, but, with perhaps one exception, always with indifferent success: and in *Coltness Iron Co. v. Black*, 6 App. Cas. 315, Lord Blackburn (at p. 336) accepts it as a settled rule that the constant course, from the statute 43 Eliz. ch. 2 downwards, was to construe an annual tax imposed on coal mines, quarries, and the like, as being imposed on that which is produced from them. But, in truth, the cases in the English Courts lend little, if any, assistance.

The question falls to be determined by reference to the language of the enactment. So far as material, it is in these words:—

"36 (1)—Except in the case of mineral lands hereinafter provided for, real property shall be assessed at its actual value. . . .

"(3) In estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act."

What did the legislature mean should be taxed when it declared that the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under the Act? It is plain that the legislature intended that mineral lands should bear a tax exceeding that to be imposed on the value of the lands in the neighbourhood for agricultural purposes, but the imposition of the additional tax was to be dealt with in another and exceptional way. And it must be assumed that in declaring that the income derived from any mine or mineral work should be subject to taxation, it had in mind the usual and ordinary method by which the products of mines is won and disposed of or dealt with, and the result, to the proprietors, of the operations of the year.

A quantity of ore, greater or less according to the extent of the operations or the productiveness of the mine, is brought to the surface. The working expenses or actual cost of production being deducted from the gross receipts, the sum left represents that which is realized for the proprietors. It is what has been gained from the year's operations, that which comes in to the proprietors, and so falls readily within the term "income derived from the mine or mineral work."

There appears no good reason for doubting that such was the intention of the legislature, for, however true it may be that the effect of continuing the working of the mine is gradually to exhaust the product, and so end the income derivable therefrom, that has for many years been recognized as the inevitable result of mining operations, without at all altering the view, long entertained, that the investors in property of this nature are not at liberty to regard for assessment purposes the annual gains or income in the light of replacement of capital. And more especially so when, as in this case, they have been treated as properly the subject of dividends.

Appeal dismissed.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, J.J.A., also concurred.

DECEMBER 7TH, 1907.

C.A.

REX v. SUNFIELD.

Criminal Law—Murder—Evidence—Statement of Deceased—Dying Declaration—Expectation of Death—Threats made by Prisoner to Deceased—Admissibility—Threats by Prisoner to other Persons—Inadmissibility—No Substantial Wrong or Miscarriage—Crown Case Reserved—Conviction Affirmed.

The prisoner, Jacob Sunfield, was tried and convicted before FALCONBRIDGE, C.J., and a jury, on an indictment which charged him with the murder of one Andrew Radzig, and was sentenced to death.

During the trial evidence was given of a statement made by the deceased Andrew Radzig as to the cause of his death, which was admitted by the Chief Justice as a dying declaration. Evidence was also given with regard to quarrels between the prisoner and the deceased, as well as in some cases with other persons.

Subsequent to the trial the Chief Justice, by direction of the Court of Appeal, given upon the application of counsel for the prisoner, stated a case and submitted for the opinion of the Court the following questions:—

1. Was the evidence of the dying declaration properly admitted?
2. Was the evidence as to quarrels properly admitted?

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. L. Counsell, Hamilton, and J. G. Farmer, Hamilton, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

Moss, C.J.O.:—The evidence taken at the trial was made part of the case, and upon the first application, as well as upon the argument of the stated case, it was fully and ably discussed by the prisoner's counsel.

The prisoner and the deceased were both natives of some part of Poland. They were both employed at the Deering Harvester Company's works in Hamilton. The deceased and his wife carried on a boarding house, in which a number of their countrymen and countrywomen lodged, and amongst them the prisoner. He had lived in the house for more than a year prior to 12th July, 1907. In the afternoon of that day the deceased was found lying on the floor of a bedroom on the ground floor of his house in a pool of blood. He was lifted up and laid upon the bed, and it was found that he had received a wound from a pistol bullet, which appeared to have entered on the left side of the head immediately below the ear; and it was subsequently shewn that this wound was the cause of his death. The bedroom opened from the dining-room of the house. Among the first to enter the bedroom when the deceased was found lying on the floor, was the prisoner, but in a short time he passed into the dining-room and sat down at the table. Shortly afterwards one William Walsh, a witness at the trial, came in, and, passing the prisoner where he sat at the table in the dining-room, went into the bedroom where the deceased was lying on the bed. There was no one else in the bedroom at the time. After a short interval he went out through the dining-room into the kitchen, where one Brandon, who had assisted to lift the deceased to the bed, was washing his hands, and, after looking out to see if there was anybody in the yard, he returned to the bedroom. He then spoke to and endeavoured to rouse the deceased, who had evidently lost much blood, and was apparently unconscious or in a stupor. Eventually he succeeded in raising him so that he made an effort to sit up in the bed, but fell back. What then happened was described by the witness as follows:—

"Q. Then what? A. Then I called him, and he kind of opened his eyes a little brighter; they were opened all the time, but to my intents (sic) he seemed quite a bit brighter, and I spoke and said, 'What is the matter, Andy?' and I said, 'Somebody cut you?' No, I said, 'Who cut you?' And he says, 'Hello, Billy, no cut, Jake shoot.'

"Q. What next happened? A. I asked him if he was badly hurt, and he did not answer me, and, realizing that he was, I said to him, 'Andy, now lie down and we send for a doctor.' And he said, 'No doctor, Billy, me die.'

"Q. Did you put him down again on the bed? A. I pulled his left arm from in under him and put him on his back and let him lie down easily.

"Q. What next did you do? A. I went out of the room."

He found the prisoner still sitting at the table with his head down upon his arms as if he were sleeping, but he did not speak, and in answer to a question, "But you had no further conversation at that time either with Radzig or the prisoner?" he said, "I never said another word to either of them."

Upon cross-examination he said he did not think the prisoner could hear what the deceased said, for the simple reason that he spoke just above a whisper. He further stated that, although he had been told there had been shooting at the house, he did not at first, when he saw the deceased lying there, think he had been shot; his impression was that he had been knifed. He was then asked:—

"Q. Repeat again the conversation that took place between you and Andrew Radzig, the Pole. A. I asked Radzig, I says, 'Hello, Andy, who cut you?' He says, 'Hello, Billy, no cut, Jake shoot.' I says, 'Well, Andy, better lie down, I will send for a doctor for you.' He said, 'No good doctor, Billy, me die.'

"Q. Did you put him down then? A. I put my hand to his back and let him go over easily, and his feet were towards the foot of the bed, and his body towards the middle of the bed towards the wall. That was the last position I saw him in.

"Q. And he never spoke to any other witness? A. No. When I saw Radzig move the first time, I called for somebody, and nobody answered me, and I came to the conclusion if Radzig should speak I should be there and not waste time for anybody.

"Q. You were expecting him to speak? A. Yes."

Further on he said he did not think the deceased was unconscious when he was there, he was only semi-unconscious.

Shortly afterwards the deceased was removed to the hospital, where he remained apparently unconscious until his death, which occurred between 4 and 5 hours after his removal from his house. He was not seen by a physician before his removal to the hospital, but he had been seen by others before he was seen by William Walsh, and they speak of his condition and describe the wound. One of them (Schwartz) asked him some questions in his native tongue, and received one answer, in the same language, in the prisoner's presence and hearing. The question was, "Who shoot you?" And the answer, "This fellow shot that has got the revolver," or "This fellow that shot me is the fellow that got the revolver," whichever it was, it shews that he realized and understood that he had received a wound from a revolver, and, as the event proved, it was a mortal wound.

Now, it was for the Chief Justice to determine, in view of all the circumstances shewn in evidence, whether the statement as to the prisoner being the person who fired the revolver should be received as a dying declaration. It appears to have been the opinion of Martin, B., that the question was one for the trial Judge exclusively, and not for the Court of Appeal: *Regina v. Reaney, Dears & B. 151, 7 Cox C. C. 209*; but it is now firmly settled that the decision of the trial Judge is subject to review. But in review the question is not whether, if another Judge had been presiding, he would have done the same thing, but whether, the trial Judge having ruled in favour of its admission, that ruling should be set aside. It is true that in this case the Chief Justice inclined at first to admit the statement as one made in the prisoner's hearing, but this ground was displaced when it appeared, upon Walsh's cross-examination, that the deceased spoke in so low a tone that it could not be heard by the prisoner. But that

could be no reason for excluding it from admission on the other ground, if the circumstances justified its admission.

Nor, as the decisions shew, does the circumstance that the incriminating statement was made before the deceased had expressed any opinion or made any statement with regard to his condition evidencing his belief in impending death from the injury he had received, prevent its admission. His mental condition is a matter of inference from the attendant circumstances, including in this case, of course, his statements.

The Chief Justice had to satisfy himself that the deceased spoke under a belief, without hope, that he was about to die from the wound that had been inflicted upon him.

Various forms of expression have been used by Judges by way of defining the necessary mental condition. "If," says Kelly, C.B., in *The Queen v. Jenkins*, L. R. 1 C. C. R. at p. 192, "we look at the reported cases and at the language of the learned Judges, we find that one has used the expression 'every hope of this world gone,' another 'settled hopeless expectation of death,' another 'any hope of recovery, however slight, renders the evidence of such declarations inadmissible.'"

Taking any one or all of these as the criterion in this case, there is no difficulty in concluding that the Chief Justice could not but be convinced that the statement was admissible. The words spoken, in the existing circumstances, in answer to a statement of intention to procure medical assistance, shew very strongly that he had abandoned all hope of benefiting by human aid, and was fallen into a settled hopeless expectation of death. Whether Walsh said, "Andy, now lie down and we send for a doctor," as he stated in his examination in chief, or "Well, Andy, better lie down, I will send for a doctor for you," as he stated in cross-examination, and whether the reply was, "No doctor, Billy, me die," as stated in chief, or, "No good doctor, Billy, me die," as stated in cross-examination, they lead to the same conclusion—a declaration of belief that every hope of this world is gone. He was aware, as his previous statement to Schwartz shews, that he had been shot; he was in fact in a dying state; and he was evidently conscious of that fact. In the circumstances,

there was ample reason for admitting the statement in evidence.

The first question ought, therefore, to be answered in the affirmative.

As to the second question, there can be no reason for excluding the testimony proving quarrels between the deceased and the prisoner, and the latter's threats. Taken in the connection in which it was given, it tended to shew an animus and furnish a motive for the crime with which the prisoner was charged. The only other instance of threats was in the case of the witness Aggi Radzig. That came out in the course of giving testimony to shew that the prisoner possessed a revolver, and it was in connection with proof of that fact that the witness testified to a threat to shoot her made on one occasion. Strictly, it should not have been received, but no special weight was attached to it, and, although the learned Chief Justice alluded to it in his charge, he only did so incidentally and in connection with the other testimony as to the prisoner's quarrels with and threats against the deceased.

We have to consider whether its reception, under the circumstances, ought to vitiate the proceedings. The case of *Makin v. Attorney-General*, [1894] A. C. 57, was pressed upon us. In that case the evidence objected to was held to be properly admissible, but the Judicial Committee expressed an opinion as to the scope and effect of a section of the Criminal Law Amendment Act of New South Wales and its bearing on the case in review, assuming that the evidence was not admissible. The words there under consideration are very dissimilar to those in sec. 1019 of the Code. The words of the New South Wales Act are: "Provided that no conviction or judgment thereon shall be reversed, arrested, or avoided in any case so stated unless for some substantial wrong or other miscarriage of justice." Their Lordships were of opinion that it could not properly be said that there had been no substantial wrong or miscarriage of justice, where, on a point material to the guilt or innocence of the accused, the jury had, notwithstanding objection, been invited by the Judge to consider in arriving at their verdict matters which ought not to have been submitted to them. Stress was laid on the fact that the evidence was on a point material to the guilt or innocence of the accused. In another part of the judgment (p. 70) it is remarked that the evidence improperly

admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence, which might appear to the Court sufficient to support the conviction, might have been reasonably disbelieved by the jury, in view of the demeanour of the witnesses. It is clear that neither of these considerations could have any special application to the circumstances of this case. Very probably they were expressed in the light of the testimony which was objected to in the case before them. It is impossible to suppose in this case that the jury might have reasonably disbelieved all the other evidence and rendered their verdict upon the evidence of a threat to shoot Aggi Radzig.

Section 1019 of the Code declares that "no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

This enactment imposes on the Court the duty of considering the probable effect of the evidence improperly admitted, and to say whether, in its opinion, any substantial wrong or miscarriage of justice was occasioned by its admission. The Court is thus placed in a position quite different to that occupied by the Court in the case before the Judicial Committee. This was pointed out by Osler, J.A., in *Rex v. Drummond*, 10 O. L. R. at p. 549, 6 O. W. R. 211. And, in view of all the evidence and the whole facts and circumstances of this case, there is no good ground for the opinion that any substantial wrong or miscarriage of justice was occasioned on the trial by reason of the evidence in question. And that should be the answer to the second question.

MACLAREN and MEREDITH, JJ.A., each gave reasons in writing for the same conclusions.

OSLER and GARROW, JJ.A., also concurred.

THE
ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, DECEMBER 19, 1907. No. 30.

BRITTON, J.

DECEMBER 9TH, 1907.

WEEKLY COURT.

CARROLL v. ERIE COUNTY NATURAL GAS AND
FUEL CO.

*Contract—Breach—Supply of Gas—Value—Damages—
Liability of Several Defendants—"Reservation"—Plant
"Exception"—Judgment—Construction of Contract—
—Evidence as to Damages—Measurement of Gas—
Computation—Reference—Report—Appeal—Costs.*

Appeal by defendants and cross-appeal by plaintiffs from
report of local Master at Welland.

W. M. Douglas, K.C., and T. D. Cowper, Welland, for
defendants.

G. F. Shepley, K.C., and W. M. German, K.C., for plain-
tiffs.

BRITTON, J.:—These appeals are in continuation of the
long litigation between the parties, which began in 1894,
growing out of an agreement for sale by the plaintiffs to
the defendants the Erie County Natural Gas and Fuel Co.
of certain wells and leases.

The agreement is dated 6th April, 1891. The plaintiffs
were the owners of leases over gas territory, upon which
were 16 wells, in addition to 2 in course of being drilled.
The plaintiffs carried on the business of making quick lime,
quarrying stone, &c. So far as I can make out from the
evidence of the plaintiff S. S. Carroll, the plant which plain-
tiffs had at the time of the transfer consisted of 2 kilns,

a centrifugal pump, lake hopper, land hopper, a small boiler to supply stone to the kilns, another small boiler to supply the centrifugal pump, a jet pump, and at least two other small boilers. They had also a cable hoist in course of construction. The only additions to the this plant from the time of the sale of the leases to the Erie company down to the time of the sale of plaintiffs' business in 1902, to the Empire company, was the addition of a second cable hoist and two additional lime kilns and another small boiler. The plaintiffs contended that under the agreement of 6th April, 1891, and the further document of 20th April, 1891, completing the sale of the leases, they were entitled to a reservation of sufficient gas to supply their plant then operated, on the property, so that they could continue their business. On 6th April, 1891, the plaintiffs were getting gas for this purpose from the "main" through which the gas flowed to supply consumers, and was delivered by the Erie company in the enlarged business of supplying gas which they, after their purchase, carried on.

After 6th April the plaintiffs continued to get their gas as before until 18th July, 1894. On that day the Erie company sold out to the defendants the Provincial Natural Gas and Fuel Co., and the latter company immediately cut the plaintiffs off.

The plaintiffs then brought an action to restrain the Provincial company from interfering with plaintiffs' supply. This action was carried to the Supreme Court, 26 S. C. R. 181, and the plaintiffs failed. The present action was commenced on 20th July, 1896. The plaintiffs asked to have the instrument of transfer of 20th April, 1891, from them to the Erie County Natural Gas and Fuel Company, rectified and reformed by inserting therein, in apt terms, a provision securing to the plaintiffs gas from the wells mentioned, sufficient to supply the plant then operated or to be operated by the plaintiffs on their property, or otherwise, so that the said instrument might express the true agreement between the said parties. The action was tried before the late Chief Justice Armour, and judgment was given by him on 28th April, 1897, and was, so far as at present material, as follows: that the conveyance dated 20th April, 1891, be reformed as of that date by inserting therein before the attestation clause the following words: "It is understood that the parties of

the first part reserve gas enough to supply the plant now operated or to be operated by them on said property."

A reference was directed to the Master at Welland to ascertain and report what damages (if any) the plaintiffs had suffered by reason of the action of the defendants in not permitting them to take gas for the supply of their works operated by them on the property referred to.

The judgment of the trial Judge was reversed by the Court of Appeal, but was restored by the Supreme Court: see 29 S. C. R. 591.

The reference then proceeded in the Master's office, and he has reported in substance as follows:—

1. That from 15th November, 1894, to 1st August, 1902, the plaintiffs were entitled to have their works, operated by them on the property mentioned in the agreement, supplied with gas from the gas mains of the defendants the Provincial Natural Gas and Fuel Company, and that they were prevented by the last mentioned company from getting such gas.

2. That by reason of the action of the last mentioned defendants the plaintiffs were obliged to consume their own natural gas.

3. That the plaintiffs did consume 911,722,303 cubic feet of gas.

4. That this gas was worth 12½c. per thousand cubic feet, and on that basis he found \$113,965.29 as the amount which the defendants the Provincial Natural Gas and Fuel Company should pay.

The finding of the learned Master was only against the Provincial Natural Gas and Fuel Co., as, in his opinion, the other defendants (the Erie company) were not liable, and he so found "notwithstanding the fact that no question of separate liability was raised" before him.

The Provincial Natural Gas and Fuel Co. appeal from this report on many grounds, and the plaintiffs appeal so far as the report is in favour of the Erie County Natural Gas and Fuel Co.

The plaintiffs should succeed in their appeal. The judgment is against both defendants, and the reference was to assess damages, if any, against both. The defendants made common cause, and as it appears to me, it was not open to the Master, having found damages, to limit the plaintiffs' recovery to the defendants the Provincial company, and to

completely exonerate the other defendants. There is nothing before me to shew that there was argument or contention on behalf of the Erie company that they were not liable if the plaintiffs were, upon the law and facts, entitled to recover damages for the causes of action mentioned.

The objections by the defendants on this appeal are, first, as to the meaning of the word "reservation" implied in the words "reserve gas enough" in the agreement, and as to the effect of these words in creating a liability against the defendants. I am of opinion that the Master is right in the conclusion arrived at by him, and for the reasons given by him, as to the question of liability. Whatever variety of meaning may be given to the word "reservation," and however it may be distinguished from the word "exception"—where such words are used in a conveyance—it was clearly the intention of the parties to this agreement that the plaintiffs should get from the gas wells being sold to the Erie company "gas enough to supply the plant" then operated or to be operated by the plaintiffs on their property. The parties contracted in reference to an existing state of things. The plaintiffs were, at the time of the agreement, operating a plant in carrying on their business, and in order to carry on this business they required gas from the wells owned by them and being sold, and it was gas from a known source of supply, and obtained and used by plaintiffs in a way well known to the Erie company, that by this agreement the plaintiffs intended to reserve the right to get, and that the Erie company were willing the plaintiffs should get. What was reserved by plaintiffs was gas of value for plaintiffs' purposes—the plaintiffs had a right to it—the defendants interfered with that right, and so are liable. If the words inserted were not intended to create, or do not in fact create, a liability for any interference with plaintiffs' right, the Court above would have varied, or set aside, or qualified the finding of the trial Judge, and there would have been no reference as to damages. With the document of sale, as it is since its reformation, I am of opinion that it was not open to the Master, and it is not open to me on appeal, to say that it does not operate as a covenant or agreement in plaintiffs' favour, or that it is void because there can not be a reservation of gas, or because the reservation is void for vagueness.

Apart from feeling myself bound by the judgment of reference, I feel no difficulty in holding that what was in-

tended by the parties and what is expressed in the document is the right of plaintiffs, for their use as mentioned, to get gas created or formed, or found, in the wells sold by plaintiffs, from which and in the manner defendants were getting gas, and so the reservation is not restricted to gas "in esse" at the time the agreement was made. See *Vancy v. Scott*, 2 M. & R. at p. 337.

To whatever length refinement may go in attempting to elicit the precise meaning of particular words, the words now under consideration clearly shew that the intention of the parties was that plaintiffs should get, of the gas available to the defendants from the property conveyed by the plaintiffs, sufficient to supply the plant then operated or to be operated by the plaintiffs, on said property. Some of the cases to which I was referred shew that, if necessary for the purpose of carrying out the real intention of the parties, a "reservation" may be construed as an "exception," and vice versa.

The best evidence of what the parties intended is in what the parties did. From 20th April, 1891, down to 18th July, 1894, the plaintiffs continued to get gas for their plant, just as they had done prior to 20th April. Upon the sale by the Erie County Natural Gas and Fuel Co. to the Provincial Natural Gas and Fuel Co., which was carried out on 18th July, 1894, the latter company cut plaintiffs off. Until that time there was not any doubt or difficulty about the true construction of the agreement.

The Master's finding that the plant for the supply of which plaintiffs were entitled to gas, was upon the property of plaintiffs, within the meaning of the agreement, is, in my opinion, right. There was a good deal of argument before me about the plaintiffs getting their supply, or a part of their supply, from the Schussler No. 1 well. That was a matter of contention at the trial. The defendants contended strongly that the plaintiffs were not entitled to the reservation claimed, as, instead of and in lieu of that, the real agreement was that plaintiffs should hold as their own Schussler No. 1: see p. 49 of the appeal book. The trial Judge dealt with that contention: see p. 76 of the appeal book. The Master could not go behind the judgment. The defendants argue that the agreement, as it stands, must be interpreted, and the damage, if any, measured, having in view the fact that plaintiffs, when the agreement was made,

were obtaining, or could obtain, from Schussler No. 1 enough gas for their plant, and so, upon failure of that well, the defendants ought not to be liable to make good from other wells the shortage arising from such failure. I do not agree with this argument. It appears in evidence that Schussler No. 1 was not producing in 1894. The Master was right in leaving out of consideration, as I think he has done, anything about what plaintiffs obtained from, or represented could be obtained from, that well.

The Master is right, and for the reasons stated by him, in not allowing any damages for the period between 18th July and 15th November, 1894.

I also agree that if the plaintiffs are entitled to recover, they are entitled once for all; that this is a case within Rule 552, and damages may be assessed down to date of sale by plaintiffs to the Empire company in July, 1902.

I think plaintiffs are entitled to damages. On what principle are such damages to be assessed? It is not disputed that sufficient gas flowed from the wells purchased from plaintiffs, and through the main to which plaintiffs' pipe was attached, to operate plaintiffs' plant. There is evidence that the supply of gas is diminishing in some of the wells. That fact should be borne in mind in determining quantity flowing in earlier years, by tests applied in later years.

So much of the gas as would be sufficient to operate plaintiffs' plant may be regarded as belonging to plaintiffs, and defendants have converted this to their own use. That being so, the measure of damages is the value of the gas at the point where plaintiffs are entitled to get it.

It is argued that, as the plaintiffs obtained new territory, drilled new wells, and operated their plant by gas so obtained, the necessary expense of all this is what, if anything, plaintiffs must recover. This expenditure did result in plaintiffs procuring gas; this gas had a commercial value; and plaintiffs could have sold it, had they not required it in lieu of gas defendants retained, and so the plaintiffs are entitled to the value of the gas. There is evidence of a request by plaintiffs to Mr. Coste, the manager of the Provincial company, for gas, not a formal or specific demand under the agreement, but the writ was a demand as of that date, and, in view of the litigation between the parties, I think a formal demand was not necessary, or was dispensed with. The issue was

made by the defendants the Provincial Natural Gas and Fuel Co. They denied from the start the plaintiffs' rights.

As to price, there is a wide divergence in the evidence—5 cents per 1,000 cubic feet to 25 cents. I am not able to say that the Master is wrong in fixing the value at 12½ cents per 1,000 cubic feet.

In determining the quantity there is very great difficulty. It can not be done with anything like mathematical accuracy. There was no measurement of the gas plaintiffs were using while it was being used. The plaintiffs rely upon evidence of the quantity of gas that flowed through their supply pipe in a given time, and upon evidence of the gas consumed in operating plaintiffs' plant at times when tests were applied.

Mr. E. A. Hitchcock was called as a witness, and he was highly regarded and greatly relied upon by the Master. Mr. Hitchcock is a consulting and testing mechanical engineer in the Ohio University—no doubt a man of ability and of some experience; and he is able, with the aid of instruments, as he explained, to test the volume of gas passing through a pipe in a given time and under different conditions of the atmosphere. At plaintiffs' instance, Mr. Hitchcock visited their plant on 19th January, 1900, and was there 2 days, a second time in March, 1901, 2 days, and a third time, after plaintiffs had sold out their plant, on 29th, 30th, and 31st July, 1903. On this occasion, with the aid of a metre called the "Petot," which Mr. Hitchcock vouches for as the most perfect of the kind known, he obtains data—from which calculations are made shewing the quantity of gas required and used by plaintiffs from November, 1894, to July, 1902.

It is only on this last occasion that the tests are presented as accurate. Mr. Hitchcock says that in view of what he found on the last occasion the first and second are not to be relied on.

In accordance with this evidence and the computations made the Master has found the gas used, and for which defendants are liable, to be:—

(1) For operating lime kilns 520,056,670 c.f.

(2) For operating the other plant of
plaintiffs 391,665,631 c.f.

911,722,301 c.f.

I am not able to find upon the evidence the material to give these exact figures as the result of computation from Mr. Hitchcock's test. I do not agree that Mr. Hitchcock's test should govern—qualified as it is by other evidence—and by conditions—but assuming that it should determine for plaintiffs the quantity for all the years from 1894 to 1902, and assuming that the computation made by Mr. Martin is correct, I am not able to find as proved a greater quantity of gas used for the lime kilns than 318,008,372 c.f. as against the 520,056,670 found by the Master. . . .

I have endeavoured to consider with care the evidence of Mr. Hitchcock, Mr. Coste, Mr. Martin, and Mr. Reeb, as well as any other evidence bearing upon the question of quantity, and without citing parts—or quoting from it—I can only say that it does not satisfy me, and it is not sufficient to establish that there ought to be charged against the defendants any such quantity of gas required as the Master has found. If, as a matter of fact, there was so great a quantity used by plaintiffs, it should be considered as exceptional and not in the ordinary course. Such a quantity was not required for the work done. The defendants should not be held liable for any waste of gas, or for any use, out of the ordinary and reasonable use, for the operating of plaintiffs' plant in the way defendants knew about, when agreement made.

It was established—so far as I recollect it was not questioned on the argument—that in the ordinary kilns, like the plaintiffs', a ton (2,000 lbs.) of lime would require for its manufacture, and could be made with, on an average, 7,000 cubic feet of gas. . . .

For reasons given, I have concluded that the quantity of gas for manufacturing lime as allowed by the Master should be reduced as above stated, such reduction amounting in round figures to about $\frac{2}{3}$ of the quantity found. . . .

In the manufacture of lime it is necessary to keep heat on, and not allow lime or the kilns to cool too suddenly. It was described as "keeping heat on to prevent lime from spoiling." It is reasonable that gas for the purpose should be allowed. The plaintiffs gave no evidence on this point, by way of challenging the correctness of defendants' exhibit 5.

It was estimated that during the whole period gas for that purpose, if used, would be 23,743,451 c.f.: at 12 $\frac{1}{2}$ c.

per 1,000 c.f., the amount would be \$2,967.92. This amount should be allowed.

The total damages will be \$54,031.82 as follows:—

Gas for making lime\$26,584 80

Gas for keeping lime and kilns hot. 2,967 92

Gas for operating other plant 24,479 10

\$54,031 82 . . .

As to plaintiffs' appeal against the Erie County Natural Gas and Fuel Co., no notice had been given prior to the hearing, and indulgence was granted; so this appeal should be allowed without costs.

The defendants have succeeded in part—only as to amount allowed—a large amount—but, as they failed upon many objections put forward, there should be no costs of their appeal.

Appeal of defendants allowed as to amount, and the damages in favour of plaintiffs assessed at \$54,031.82.

FALCONBRIDGE, C.J.

DECEMBER 9TH, 1907.

TRIAL.

FREEMAN v. COOPER.

Sale of Goods—Action for Price—Warranty—Failure to Establish—Onus—Evidence—Course of Dealing.

Action to recover a balance of \$2,454.08, alleged to be due and payable by the defendant to the plaintiffs as the price of goods sold and delivered by plaintiffs to defendant. Defendant paid into Court \$226.26, and alleged that the plaintiffs warranted certain cement to be first-class No. 1 in quality, and represented to the defendant that the cement was equal to the best brands of cement on the market; and on that representation induced the defendant to purchase the cement, but that the cement was not of the description or quality warranted but was of an inferior description and quality, whereby defendant sustained great damage.

G. H. Watson, K.C., and J. W. Nesbitt, K.C., for plaintiffs.

Lyman Lee, Hamilton, and J. G. Farmer, Hamilton, for defendant.

FALCONBRIDGE, C.J.:—The defendant failed to satisfy the onus cast upon him of establishing any express warranty.

The defendant and the manager of the plaintiffs' firm appeared both to be persons of respectability and probity. They did not agree as to what passed between them at the time of the purchase. It is defendant's misfortune if he has not any writing, nor indeed any circumstance of corroboration, to turn the scale in his favour. Plaintiffs' firm are not manufacturers; they deal not only in cement but in other commodities, e.g., wood and coal. The particular brand of cement which was attacked is spoken of by persons of many years' experience, like Michael A. Piggott, as being a brand which had a good reputation before others now in the market were discovered or developed; that it is to be relied upon, and that fact is known amongst contractors; and that it can be offered confidently to architects and engineers. So that upon this branch of the case I must hold that there was no warranty, express or implied.

But if I were to hold otherwise on the first branch of the case, it would be impossible for me, upon the evidence before me, to hold that the defendant had satisfied the onus of establishing that the trouble which arose in the construction of the building was due to defects in the quality of the cement. There were other causes which might satisfactorily account for the imperfections besides the theory—for after all it was only a theory—of the experts called by the defendant. There was palpable neglect and want of ordinary business care in the conduct of the defendant and those placed by him in charge of the construction. There was no inspection of the gravel at the pit by any person of skill. Teamsters appear to have brought it as they chose. Material was thrown together in a haphazard fashion without any proper proportions being regarded, and it was handled and used in construction by mere workmen without any knowledge of or skill in so delicate a process. I should say that this course of dealing supplies a more obvious and probable cause for the difficulties that ensued than does any alleged defect in the cement.

The result is that the plaintiffs are entitled to judgment for the full amount, less the sum paid into Court, with costs. The counterclaim is dismissed with costs.

DECEMBER 9TH, 1907.

DIVISIONAL COURT.

BRYANS v. MOFFATT.

*Jury Notice—Motion to Strike out—Discretion of Judge—
Exercise before Trial—Place of Trial outside of Toronto
—Equitable Defence—Pleadings.*

Appeal by defendants from order of BOYD C., in Chambers, striking out defendants' jury notice.

The action was brought by the executors of the will of Robert Stewart, deceased, against Andrew Moffatt and Elizabeth Moffatt, his wife, to recover \$1,000 principal and \$50 interest upon a covenant by the defendants for payment to the testator of the moneys secured by an indenture of mortgage dated 5th October, 1905.

The defendant Andrew Moffatt, by his statement of defence, admitted that the mortgage moneys, amounting to \$1,000 and interest, had not been paid; and said (2) that on and prior to the 25th September, 1905, the deceased Robert Stewart was the owner of 200 acres, and prior to that date, being anxious to dispose of the same, proposed to the defendant Andrew Moffatt that he should agree to purchase the lands at the nominal price of \$4,500, and that he (Stewart) would convey the same to him (Moffatt) at that figure, and that he (Moffatt) should raise by way of mortgage on the security of the lands \$3,500 and pay the same to Stewart, and that he (Moffatt) should give to Stewart security that he would pay to Stewart an annuity of \$50 per annum, that amount being fixed as interest at the rate of 5 per cent. per annum on \$1,000, but that on the death of Stewart there should be no obligation resting on Moffatt to pay the \$1,000, or any part thereof, and Moffatt accepted the proposal; (3) that Moffatt was ignorant in matters of conveyancing, and had had little or no experience in matters of business, and trusted entirely to Stewart to carry out the proposal and acceptance according to the terms and conditions thereof, and had no independent or other advice; that Moffatt was instructed to present himself and his wife to an unlicensed conveyancer, who was not a solicitor, selected by Stewart to carry out the contract, and

Moffatt, without consideration and without understanding them, signed such papers as were put before him; that the raising of the \$3,500 and the borrowing of the moneys on a mortgage were arranged by the conveyancer or by Stewart, and Moffatt took no part therein other than signing such papers as were put before him, but he knew that the \$3,500 was borrowed from one Richard Souch; (4) that Moffatt did not understand at the time that he was signing a mortgage for \$1,000 payable to Stewart and covenanting therein that he would pay him \$1,000 and interest, as it turned out that he had, but supposed he was simply signing a writing securing to Stewart the payment of an annuity of \$50 for his life; (5) that Moffatt made the contract with Stewart that the lands should be conveyed to him alone, and not to him and his wife, as had been done, and Moffatt instructed his wife, when he requested her to go to the conveyancer to sign the necessary papers, that she was required to sign for the purpose of barring her prospective right to dower in the lands only, and for no other purpose, and his wife did not know that the conveyance was being made to him and her jointly, and that she was signing the mortgage to Souch and giving security for the annuity to Stewart as a joint owner and mortgagor; (6) that Moffatt, after the commencement of this action, and after he had consulted his solicitors, who searched the papers in the registry office, and had been advised by them, learned for the first time that the conveyance had been made to him and his wife jointly, and that his wife jointly with him had covenanted to pay the amount of the mortgage moneys to Souch and to Stewart; (7) that the lands, at the time of the agreement to purchase referred to, were not worth \$4,500, and were not saleable for more than \$3,500; (8) that Moffatt and his wife, on 16th October, 1907, offered to the plaintiffs, and were now willing and offered, to pay all interest in arrear on the Souch mortgage to a reasonable time after the date of the defence (16th November, 1907), and all arrears of annuity of \$50 to the date of the death of Stewart, and also pay to the plaintiffs a proportionate share of the \$50 per annum from the date of the death to a reasonable time after the date of the defence, and to pay all taxes for 1907, and to reconvey the lands to the plaintiffs, subject to the Souch mortgage, and give up possession to the plaintiffs, and that there be no costs of the action payable by the plaintiffs or defendants to the other of them; Moffatt making this offer for the rea-

son that there may have been an honest misunderstanding on the part of the conveyancer. And Moffatt prayed that if the offer set out in paragraph 8 was not accepted by the 15th December, 1907, and before any further costs were incurred, that it be regarded as not binding on him, and that the mortgage be discharged by the plaintiffs or delivered up to be cancelled.

The statement of defence of the defendant Elizabeth Moffatt set forth: (1) that she took advantage of the facts stated in the defence of her co-defendant; (2) that she never accepted the conveyance referred to, and now formally repudiated it; (3) that she was absolutely inexperienced in matters of business and conveyancing or purchasing lands, and in carrying out the contract which her co-defendant made with Stewart she was acting without independent or other advice, and was unaware that she was making herself liable, or any little estate she had responsible, for the amounts claimed by the plaintiffs; that she simply signed any papers put before her, on the understanding that she was only barring her prospective right to dower to enable her husband to carry out any contract that he made with Stewart, and that she should not be held personally liable; (4) that she was a married woman, married in 1871, and pleaded as a defence the statutes relating to married women, their rights and liabilities; that she joined in the offer of settlement made in the 8th paragraph of the statement of defence of her co-defendant. And she prayed that if the offer made were not accepted by the 15th December, 1907, and before any further costs were incurred, the mortgage should be reformed by eliminating therefrom any liability of hers thereunder.

The plaintiffs delivered a reply in which they joined issue, denied the contract alleged by the defendants, and set up the Statute of Frauds.

The venue was laid at Cobourg.

H. E. Rose, for defendants.

A. C. Macdonell, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL J.), was delivered by

MEREDITH, C.J.:—Speaking for myself, I think the rule of practice laid down in *Ryan v. Montgomery*, 9 O. W. R. 855, 13 O. L. R. 297, might well be extended to all cases,

whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury.

I think the Court is bound to take notice of the fact that keeping juries waiting while sometimes very long cases to be tried without a jury are going on, is a grave injustice to the county, and the Court ought to endeavour, if it can be done without a denial of any substantial right to the litigants, to avoid that expense being incurred.

It is not necessary for the purposes of this case to lay that down as the practice to be followed, because it seems to us that we ought not to interfere with the discretion which the learned Chancellor exercised. It is very doubtful whether the defence which is sought to be set up would be admissible under what was formerly the plea of non est factum, and I am inclined to think that the only remedy the defendants would have, if they are able to make out what they set up, would be obtainable only by rectification of the instrument sued on, in which case a jury notice would not be proper.

It would be highly unsatisfactory in a case of this character, where there is a writing, and one of the parties to the transaction is dead, and the sole defence is that that writing does not express the true agreement, that the defendants never intended to sign such an instrument as was executed by them, that that question should be tried by a jury.

We think that the Chancellor exercised a proper discretion in striking out the jury notice, and the appeal will be dismissed with costs to the plaintiffs in any event of the action.

BOYD, C.

DECEMBER 10TH, 1907.

WEEKLY COURT.

T— v. B—.

Marriage—Action for Declaration of Nullity for Impotency of Wife—No Jurisdiction in Court to Entertain.

Pursuant to an order, the question of the jurisdiction of the Court to entertain an action to have a marriage declared null and void, was argued as a preliminary question of law in the nature of a demurrer.

C. W. Thompson, for plaintiff.

H. W. Mickle, for defendant.

BOYD, C.:—The question of jurisdiction was raised in regard to the power of the Court to entertain an action by the husband to have his marriage declared null and void by reason of the alleged incapacity and impotence of the wife, who is the defendant. The ceremony of marriage was in September, 1906, and the action is brought in November, 1907, and, according to the plaintiff's statement of claim, the parties have "lived together as man and wife," though without consummation. The defendant denies this last allegation, and affirms the fact of sexual intercourse having existed for a time, though discontinued from physical causes in the husband. The parties were of the ages of 35 and 22 when they were married. This case is now brought before me on the sole point in law as to the jurisdiction of the Court. It is a novel attempt to enlarge the jurisdiction in a case where the parties are of age, competent to contract, and have contracted to enter into the relationship of husband and wife, and have lived in marital companionship for over a year.

In 1868 Sir J. P. Wilde said: "It may be safely asserted that the question of impotency as a ground of nullity, has never yet been raised in the temporal courts of this country. . . . A suit for the purpose of obtaining a definitive decree declaring a marriage void which should be universally binding, and which should ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the ecclesiastical courts or in the Divorce Court alone:" *A. v. B.*, L. R. 1 P. & D. 559, 561. In cases of nullity the marriage status exists down to the time that the decree dissolving or annulling the marriage is made absolute: *Foden v. Foden*, [1894] P. 307.

Lawless v. Chamberlain, 18 O. R. 297, was a very different case from this. There both parties were under age, the ground of complaint was that the consent had been procured by duress and intimidation, and that there had been no coming together of the parties afterwards either in domestic or marital relations. The circumstances, if proved, were such as to shew that the alleged marriage was void *ab initio*, and that the ceremony performed was a mere unmeaning form.

Here the marriage has been validly solemnized and matrimonial relations established for many months, and the fact of alleged "impotence" would only render the relation

voidable and not void. In this case the marriage relation existed de jure from the outset, on the ground that "consensus non concubitus facit nuptias." The marriage is valid in the eye of the law, though there has been no consummation. The injured party may, upon proof before a proper tribunal, obtain a judgment declaring it to be a nullity, but till then it is merely voidable, even if the alleged impotence really exists; it is not void ab initio: *Turner v. Thompson*, 13 P. D. at p. 41.

The ratio decidendi in *Lawless v. Chamberlain* has been, I think, legislatively recognized in the late statute passed in Ontario of this year, 7 Edw. VII. ch. 23, sec. 8, providing for cases of infancy where the marriage has been merely a form, and there has been no cohabitation. See also a late American case in equity where the Court adjudicated in case where the alleged marriage was no marriage: *Rosney v. Rosney*, 54 N. J. Eq. 231.

Jurisdiction in cases of nullity and other matrimonial difficulties is given by the old statute law in Quebec: *Gemmill on Divorce*, p. 43; but no such legislation enables the Courts of this province to hold suit in cases where the marriage status is involved, and the litigation is really in rem. dissolving the existing marital union. The only forum open to aggrieved spouses is the High Court of the Dominion Parliament, to which body the right appertains: *White's Case*, referred to in detail in *Gemmill*, at pp. 111 and 191.

The plaintiff has no right of action in this Court, and his action should be dismissed with costs as between solicitor and client.

MABEE, J.

DECEMBER 10TH, 1907.

TRIAL.

STUART v. BANK OF MONTREAL.

Husband and Wife—Guaranty by Wife of Advances to Husband from Bank—Absence of Independent Advice—Settlement with Bank—Property of Wife Handed over to Bank—Action for Rescission and Return of Property—No Fraud or Misrepresentation—Consideration—Estoppel—Release.

Action to rescind many transactions entered into by the plaintiff, a married woman, with the defendants, upon the

ground that they were so entered into by her without independent advice.

I. F. Hellmuth, K.C., and W. J. Elliott, for plaintiff.

G. F. Shepley, K.C., for defendants.

MABEE, J.:— . . . Mr. John Stuart, the plaintiff's husband, had for many years prior to 1896 occupied a very prominent position in financial and mercantile matters in Hamilton—he was the head of a large wholesale house, the president of the Bank of Hamilton, and connected with other corporations.

Prior to 1896 he had made large investments in the Maritime Sulphite Fibre Company, owning a pulp and paper mill at Chatham, N.B.; he was the president of the company, his only living son was the general manager, almost the whole of his available resources were invested in that company—the defendants were carrying the account, and more money was urgently required if there was to be any likelihood of the company being made a success. On 6th February, 1896, Mr. Stuart in a letter to the defendants says: "He (Mr. Lee, a fellow director), however, knows that the \$50,000 mentioned in the guarantee will not be sufficient to carry us through. . . . I shall find a surety to take his place. I explained to him, as to you, the pressing necessity for relief in money matters in Chatham during the next few days. . . . Mr. Lee will either sign the guarantee in a day or two, or agree with me for a substitute; in the latter case my wife will join me in the guarantee, and I now submit her name to you for that purpose. As I told you, her means are ample enough to secure payment for a much larger sum than we contemplate requiring now or in future. Pending the carrying out of these arrangements, I trust you will authorize your Chatham branch to pay the company's cheques for funds required as follows (then follows a statement amounting to \$7,500). I would prefer, as you will readily believe, not to ask this favour lest it should meet the fate of similar previous ones, but it is based upon the proposals above recited, and I trust you will have no doubt that my promise to complete one or other during the coming week will be kept."

On 7th February the general manager of the bank wrote saying the bank would advance \$4,250 of the \$7,500 asked.

and stating the balance could stand until the guarantee was completed, and the following is a postscript: "I think it only reasonable to ask that, if you offer Mrs. Stuart's guarantee, you should furnish us with a statement of her means and ability to make it good."

The information was furnished, shewing Mrs. Stuart to be possessed in her own right of real estate, stocks, and mortgages to the value of about \$250,000.

On 24th February, 1896, Mr. Stuart completed the proposed transaction, or rather the guarantee bearing that date was completed shortly afterward, and the plaintiff signed a document guaranteeing advances to the Sulphite Company up to \$100,000.

On 14th February, 1896, she assigned in trust for the bank mortgages amounting to about \$27,000, and on 11th April, 1898, she gave out the guarantee to the bank for Sulphite Company advances up to \$125,000; this latter was inclusive of the \$100,000 guarantee, so her total liability was not to exceed \$125,000.

Advances were made by the bank upon these guarantees, and in 1903 the company went into liquidation, and on 2nd October, 1903, the plaintiff and her husband gave the bank a mortgage upon all the real estate owned by them. On 25th July, 1904, a lengthy agreement was entered into between the bank and the plaintiff and her husband—the result of which was that the plaintiff gave up to the bank all her estate, both real and personal, in settlement of her guarantee. The plaintiff's husband, at this time, was liable to the bank upon a note for \$196,052 and a guarantee of \$50,000, and he was discharged from this debt by the bank. Many stocks that the plaintiff owned, but which stood in the name of her husband, were pledged by him for advances from other banks, and the equity of redemption only in these was turned over by the settlement of July. There was nothing in the transaction to shew the defendants that these stocks belonged to the plaintiff, and I have every reason to believe the officers of the bank traded upon the basis of these stocks belonging to the husband.

On 6th January, 1903, Mr. John Stuart resigned his position of director and president of the Bank of Hamilton, and received from them an agreement to pay him the sum of \$5,000 per year so long as he lives, the payments to be made monthly in advance. Of course, by releasing him

from the indebtedness to the bank, in consideration of both the husband and wife agreeing to make the transfers provided for in the settlement of July, the defendants put it out of their power to proceed for the recovery of the \$5,000 per year payable by the Bank of Hamilton. Mr. Stuart said he had understood that was not available for creditors, but it is quite apparent that the defendants could have obtained judgment against Mr. Stuart and obtained a receiving order and swept away from him the monthly payments from the Bank of Hamilton.

Many deeds were executed as provided for by the settlement of July, 1904, the properties turned over to the bank, stocks sold, some of the real estate, if not all, it was said in argument, had been sold, and the position of the defendants entirely changed.

In 1903, during the liquidation of the Sulphite Company, the defendants were in litigation with the liquidators, and on 6th October, 1903, Mrs. Stuart joined in an agreement authorizing the settlement of that litigation, upon the strength of which the defendants made compromises and otherwise changed their position, and made a cash payment to the liquidators of \$15,000.

On 24th February, 1896, 5 shareholders and their representatives transferred to the plaintiff 134 preference and 100 ordinary shares (in all \$23,400) "in consideration of Mrs. Jane J. Stuart giving a guarantee to the Bank of Montreal for advances made and to be made to the company to the extent of \$100,000." Mrs. Stuart signed acceptances of the transfer of these shares upon the books of the company, and from time to time gave proxies for them to be voted upon. In a letter written by Mr. Stuart to Mr. Bruce (who was a shareholder and guarantor to the bank) of 12th February, 1896, he says: "The question at once presents itself, what inducement can we offer to any one to assume the responsibility of guaranteeing the necessary advances (\$100,000 referred to in the letter) and how can the matter be arranged? . . . I believe I can procure the guarantor required by the bank for the new advances, or the security of a lien on material to the bank, and the postponement by Mr. Lee and myself of our claims for cash advances, together with a reasonable bonus in the way of stock, which may under existing circumstances be considered of only nominal value. It is of course most vital to me to save this property

in which my all is invested, and it is of no small consequence to all concerned, for all have not merely an interest in the value that is expected to be given to the stock, but also perhaps a more serious responsibility contingent on the unpaid debt due to the Bank of Montreal."

Of course Mrs. Stuart was the guarantor referred to in the letter, and, in addition to the stock bonus which was given to her, the postponement of the debt for cash advances was also executed by Messrs. Stuart and Lee. On 26th February, or thereabouts, when the \$100,000 guarantee was given by the plaintiff, the advances already made, and for which the plaintiff was becoming liable, were about \$20,000, but whether this sum includes the \$7,500 which Mr. Stuart was asking in his letter of 6th February, 1896, the bank to advance upon the strength of the guarantee being given, does not clearly appear, but it is altogether likely it does include that sum, as on 20th February the debt upon this head was only some \$11,000. In any event the guarantee was not given for an entire past due liability to the bank; at least the sum of \$80,000 was advanced upon the strength of the first guarantee, and an additional sum of \$25,000 upon the second guarantee, being given.

Mrs. Stuart is a lady of intelligence and refinement. She was the sole executrix and devisee under her father's will, and obtained in land and securities about \$250,000 from that source upon his death in 1886. Her husband had had the entire management of her estate, and in 1896 it stood at something like \$240,000.

Prior to becoming liable to the defendants in February, 1896, she had indorsed for her husband a note discounted and then held by the Bank of Hamilton for \$125,000; that note was afterwards paid out of the proceeds of her securities, which, with the transfers made by her to the defendants in 1904, entirely wiped out her fortune.

She says she had no experience in business matters, that she signed at her husband's wish, that she knew something of his business matters, and thought he had independent means, that she knew of his connection with the Sulphite Company long before 1896, and that she also knew Messrs. Lee, Bruce, Brown, and Leys were connected with it, that her son had been connected with it for many years, and was the manager, and that she and her husband were both hoping the company would afford him an opportunity for a success-

ful business career. She also says she knew there was nothing that her husband was more engrossed in than the success of the company, and that she knew he had a large amount invested in it; that upon that account and her son being manager she was also interested in its success. She says she consulted no one about the wisdom of her entering upon the guarantee; that she would have scorned to consult any one about the transaction, and regarded it solely as a matter between herself and her husband; that she knew the bank would advance a large amount of money to the company that her husband and son were interested in, upon the strength of the guarantee; and that she intended the bank to act upon the guarantee and advance the money; that she was in no way under the control or influence of her husband, but exercised her own free will; and that she was sanguine about the success of the company, if the bank would advance the money. She says that if her husband had said to her not to enter into the guarantee without asking some one else, she would have refused to consult any person else, that she knew there was no sham about the guarantee, and that she was becoming legally bound; that her husband did not make the slightest misrepresentation to her, and she repudiates the suggestion that she was in any way deceived or misled. Then when giving the second guarantee she said she knew the company wanted more money, and that that was the reason she was asked to give the additional guarantee. She did not remember getting stock in the company, but at once frankly recognized her signatures in the company's books, and to the proxies, although she had also forgotten about the latter. Then, speaking of the settlement made in 1904, when she gave up everything, she says she knew all the facts connected with the matter, and had learned nothing additional to what she knew at that time; she knew of the arrangement the Bank of Hamilton had made to pay her husband an annuity of \$5,000 per year; that the bank were releasing him from all liability; she knew she was conveying everything to the bank; that they could not keep up Inglewood (the Hamilton residence, which also belonged to her), on \$5,000 a year, and that she intended the bank to get it.

Mr. Stuart says that no misrepresentations of any kind were made to induce her to sign any of the documents; and

that he told her "she was to get shares in the Fibre Company as a sort of acknowledgment of her goodness in doing this."

There is no element of fraud of any kind in the case. There was the utmost good faith by Mr. Stuart both towards the bank and the plaintiff throughout a long course of dealings in connection with this Sulphite Company, and, so far as the evidence and correspondence discloses, the same upright dealings and good faith entered into all the business transactions had between the guarantors to the bank.

Mr. Hellmuth contends, in the face of all this, that all these documents signed by the plaintiff must be rescinded, and that the law is that the wife cannot make herself liable for the debt of another without first having had independent advice. I have read all the cases cited by him and many more, and the opinion I entertained at the trial that this action could not possibly succeed has only been strengthened.

Powell v. Powell, [1900] 1 Ch. 243, followed in Wright v. Carter, [1903] 1 Ch. 27, are entirely different cases and were not between husband and wife. In Morley v. Loughnan, [1893] 1 Ch. 736, the statement made at p. 752 as follows, "or the donor may shew that confidential relationship existed between the donor and the recipient, and then the law upon grounds of public policy presumes that the gift in fact freely made was the effect of the influence induced by those relations, and the burden lies upon the recipient to shew that the donor had independent advice, or adopted the transaction after the influence was removed or some equivalent circumstances," is, I think, too wide, and must be intended to apply to the facts of that case, and it by no means follows that the wife, having separate estate of her own, can never make any contract for the benefit of the husband without independent advice.

Of course Adams v. Cox, 35 S. C. R. 393, was relied upon, and I presume it was upon the supposed authority of that case that the action was brought. No one would suggest that the facts are in any respect similar—the signatures of the ladies in the Cox case were obtained by gross fraud and misrepresentation, and no fresh advances were made upon the strength of those signatures; but it was argued that the case stands as a binding authority that the wife cannot obligate herself upon a contract for the husband's benefit without independent advice, fraud or no fraud, deceit or no deceit. It may be that that is the result of the judg-

ments of two members of the Court, but, as I read the case, it is not the judgment of the majority, and I do not think goes so far as to place the wife in the same position as a son, daughter, or ward, and prohibits her contracting as the statute has enabled her to do.

Mr. Hellmuth contended that the concluding words of the judgment of Mr. Justice Sedgewick made it appear that he was joining in the judgments of Mr. Justice Girouard and Mr. Justice Davies, but I do not think this at all clear, nor was it necessary in the view he took of the case.

By 22 Vict. ch. 85, secs. 1 and 2, provision is made for the conveyance of real estate of a married woman to such use as to her husband may seem meet. Section 2 provides for the execution in Upper Canada of a deed by a married woman before a Judge of the Court of Queen's Bench, Common Pleas, or County Court, or two justices of the peace, an examination of the married woman apart from her husband respecting her free and voluntary consent to convey was required, and if this was given it had to be indorsed upon the deed. Section 7 provided that a deed not so executed should not be valid or have any effect. 34 Vict. ch. 24 repealed some of the provisions of 22 Vict. ch. 85, and enlarged the class of persons before whom such a deed might be executed. Then 36 Vict. ch. 18, sec. 14, repealed the above provisions, and, by sec. 3, enacted that every married woman . . . might by deed convey her real estate . . . as fully and effectually as if she were a feme sole. Now, applying these provisions of the law to the transactions of July, 1904, whereby Mrs. Stuart conveyed her real estate to the bank in discharge of her own and her husband's indebtedness, how can it be said the bank were bound to see that she had independent advice? The statute had for many years required in effect independent advice, by means of the examination apart from her husband respecting her free and voluntary consent, and, if the abolition of this provision and empowering her to convey as effectually as if she were a feme sole meant anything, it made independent advice unnecessary. This in no way jeopardizes the married woman, because the Court in each case would scrutinize the transaction closely, and where unfair dealing, misrepresentation, fraud, or overreaching was shewn, would see that she was adequately protected.

Then, even were the doctrine of independent advice applicable, what is to be done where the attacking party says she would have scorned to take any independent advice. Mr. Hellmuth invited me to apply the law laid down in *Powell v. Powell*, [1900] 1 Ch. at p. 246, where Farwell, J., says: "Further, it is not sufficient that the donor should have an independent adviser, unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule, but the stronger the influence the greater the need of protection." The learned Judge in that case was dealing with a settlement by a young girl, just from a convent and barely 21 years of age, made upon her step-mother, through the instrumentality of the solicitor of the step-mother. If any such rule is applicable to transactions between husband and wife, the sooner the legislature repeals the Married Woman's Property Act, and reverts to the old case of requiring an examination apart from the husband, the better for the security of the public. In the meantime, I shall hold that the married woman is free to convey, of course apart from fraud or misrepresentation; and the result then as to all the conveyances and transfers made by the plaintiff to the defendants in July, 1904, having made them with a full understanding of the facts, and there being no fraud or misrepresentation of any kind, but, on the contrary, the most absolute fair dealing upon the part of the bank and all concerned in the settlement, is that they are not open to attack.

There are, I think, other grounds upon which all the transactions can be upheld. The original guarantee of February, 1896, I think, was executed for valuable consideration moving to the wife. She was vitally interested in the protection of her husband's fortune, which was invested in this mill, and it is apparent from the correspondence at the time that the business must go under if no more money could be obtained from the bank. She was interested in the success of her son, the general manager. She obtained a considerable block of the stock of the company, and must have known that the control and expenditure of the bank's advances would be almost entirely in the hands of the husband and son—surely all this formed consideration of the most valuable kind. Then, I think also, the plaintiff long since

estopped herself from questioning the original guarantees by the authorization given by her to the bank to settle the litigation with the liquidators, the release of others who were liable to the bank, and the changes in the bank's position by the agreements made with the plaintiff, so the parties could never be placed in their original positions. Then, I think it is obvious, even if the matter were otherwise open to attack, that the deeds of July, 1904, could not be vacated without also rescinding the release given by the bank to the husband, and leaving the bank to their rights against the \$5,000 annuity; this was all one transaction, and it would be absurd to take from the bank the consideration given by the wife for the husband's release without reinstating his liability—this could not be done in this action, as the husband is not a party.

I was strongly pressed to find that Mrs. Stuart had the advice of her family and her son-in-law, a practising solicitor in Hamilton, before giving the first guarantee. There certainly are facts that point most strongly to the conclusion that the matter was discussed, but, taking the view of the case that I do, I do not regard it as necessary to find either way upon this point.

The case fails entirely, and must be dismissed with costs.

CARTWRIGHT, MASTER.

DECEMBER 11TH, 1907.

CHAMBERS.

CANADA SAND LIME AND BRICK CO. v. POOLE.

Mechanics' Liens—Statement of Claim—Motion to Set aside—Affidavit Sworn before Plaintiffs' Solicitor—Rule 522—Expiry of Time for Filing Statement of Claim—Practice.

Motion by defendant Morrison to set aside the statement of claim in a statutory action to enforce a mechanics' lien, upon the ground that the affidavit required by the Mechanics' Lien Act, R. S. O. 1897 ch. 153, sec. 31, sub-sec. 2, was sworn before the plaintiffs' solicitor.

G. W. P. Hood, Toronto Junction, for defendant Morrison.

R. G. Agnew, for plaintiffs.

THE MASTER:—The applicant's contention is supported by Rule 522, which says that such an affidavit "shall not be used," with only one exception. The affidavit in this case is intitled in the High Court of Justice and in the full style of the cause.

The question would not be of any moment were it not that it will now be too late to file a new statement of claim, and the success of this motion will deprive the plaintiffs of any remedy against the land. But this, while a weighty reason for upholding the proceeding if it can properly be done, is no ground for seeking to evade the Rule. The statement of claim was not delivered to defendant until the 90 days had elapsed, though it was dated 3 weeks earlier. Had the plaintiffs been prompt, the present difficulty could have easily been cured. If in that case the defendant had not moved until the expiration of the 90 days, he might have been held to have waived the defect.

As it is, there does not seem to be any power to relieve the plaintiffs, and an order must go setting aside the statement of claim, but, in the circumstances, without costs.

By sec. 31, "the ordinary procedure" of the High Court is made applicable to these proceedings, and the Rules are styled "The Rules of Practice and Procedure." It seems to follow that Rule 522 can be successfully invoked, and must be applied if its plain direction is disregarded.

CARTWRIGHT, MASTER.

DECEMBER 11TH, 1907.

CHAMBERS.

MCLEOD v. CRAWFORD.

Evidence—Motion for Better Affidavit on Production of Documents—Examination of Witnesses in Support of Motion—Appointment for, Set aside—Discovery.

Motion by plaintiffs to set aside an appointment and a subpoena issued by defendants for the examination of witnesses under Rule 491 for use on a pending motion for a further affidavit on production by plaintiffs, on the ground

that the sufficiency of an affidavit on production cannot be impeached in this way.

J. B. Holden, for plaintiffs.

S. R. Clarke, for defendants.

THE MASTER:—This question was to some extent before me in *Doyle v. Williams*, 9 O. W. R. 286, and I see no reason to arrive at a different conclusion on this motion, which seems to be decided by the judgment of a Divisional Court in *Standard Trading Co. v. Seybold*, 1 O. W. R. 650. In *Doyle v. Williams* it was not denied that there were, *prima facie*, documents which might have to be produced on discovery. Here, no less than in *Dryden v. Smith*, 17 P. R. 500, there is an attempt to do indirectly what cannot be done directly. If it was a possible method of obtaining a further affidavit, it might be supposed that it would have been attempted sooner. And there would not then have been any necessity for the amended English Rule referred to in *Doyle v. Williams*, *supra*, and case cited. On examination for discovery the plaintiffs can be asked as to the existence of other documents. If any such are shewn to exist and to be relevant, no doubt they must be produced.

As at present advised, I hold that the motion must be allowed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER.

DECEMBER 12TH, 1907.

CHAMBERS.

CLARKSON v. CRAWFORD.

Writ of Summons—Service out of Jurisdiction—Contract to be Performed in Ontario—Rule 162 — Conditional Appearance.

Motion by defendants to set aside order obtained by plaintiff under Rule 162 permitting the issue of a writ of summons for service upon the defendants out of the jurisdiction, and the writ issued pursuant thereto, and the ser-

vice on the defendants. The action was for specific performance of an agreement to take stock in a projected company.

A. O'Heir, Hamilton, for defendants.

W. M. McClemon, Hamilton, for plaintiff.

THE MASTER:—The affidavit on which the order was made refers to the agreement, which was therefore before the Court. In it there is no mention of the plaintiff company, and the affidavit is styled only in a cause with Clarkson as sole plaintiff. This was probably an oversight in some way, and might be amended, if necessary.

The more serious difficulty is that the agreement makes no mention whatever of the plaintiff company. It is true that in the statement of claim it is said that Clarkson made the agreement sued on "as agent of his co-plaintiffs"—but the statement of claim is not mentioned in the order as part of the material on which it was issued. The agreement itself refers to a conveyance of realty in this province for the formation of a company with head office in Hamilton, and in which defendants were to have stock to the value of \$50,000, on payment of that amount in cash. It may not unfairly be assumed that this payment was *prima facie* to be made at Hamilton, as it would be there that the stock would be allotted and certificates issued to the defendants. But this should have been made quite clear. The right of the plaintiff company is not anywhere apparent. It is not even mentioned in the agreement.

The better course seems, therefore, to be to allow defendants to enter a conditional appearance. *Burson v. German Union Insurance Co.*, 3 O. W. R. 230, 372, and at the trial, 6 O. W. R. 21, where the action was dismissed on the ground of failure to shew a cause of action in this province, shews that it is not at any earlier stage that the question of jurisdiction can satisfactorily be determined in many cases. To the same effect are the expressions of the Chancellor in *Canadian Radiator Co. v. Cuthbertson*, 9 O. L. R. 126, 5 O. W. R. 66. . . .

[Reference also to *William Blackley Limited v. Elite Costume Co.*, 9 O. L. R. 382, 5 O. W. R. 57, and *Dominion Canister Co. v. Lamoureux*, 7 O. W. R. 272, 378.]

Following these cases, I think the motion should be dismissed and the defendants allowed to enter a conditional appearance. . . .

Costs in the cause unless the trial Judge otherwise orders.

RIDDELL, J.

DECEMBER 12TH, 1907.

TRIAL.

HARDY v. SHERIFF.

Will—Construction—Allowance to Guardian of Infants—Additional to Infants' Allowances for Maintenance—Income of Estate—Direction for Accumulation of Part—Annuities out of Surplus Income—Costs—Action Brought where Summary Application Sufficient.

Action for construction of will of G. T. Fulford, deceased.

W. Nesbitt, K.C., and Britton Osler, for plaintiff.

H. S. Osler, K.C., for unborn infants.

E. T. Malone, K.C., for executors.

I. F. Hellmuth, K.C., and D. W. Saunders, for infant G. T. Fulford.

H. B. McGiverin, Ottawa, and A. Haydon, Ottawa, for defendant Sheriff.

F. W. Harcourt, for other infants.

RIDDELL, J.:—The late G. T. Fulford, 13th February, 1902, made his will, which is the subject of this action. It is not long, but one of the provisions has given rise to a controversy involving, as I am informed, \$1,000,000 or more. At the time the will was made the testator had two daughters, one, the plaintiff, nearly if not quite 21 years of age, and the other, the defendant Mrs. Sheriff, about 19. A son, the defendant G. T. Fulford, was born 6th May, 1902, 3 months after the date of the will.

I shall refer to the parts of the will which seem to me to be of consequence in this inquiry.

The testator, after appointing executors and giving them power of management, etc., authorizes them to invest the moneys of the estate, as they come in, in government bonds and other securities. Provision is then made for continuing the business, which is said to have been very profitable; this business to be kept up by employing the profits and proceeds therefrom, but not the capital or income of the existing investments. By clause 10 an annuity of \$12,000 per annum was directed to be paid to each of the daughters, D. (the plaintiff) and M. (now Mrs. Sheriff), "till she attains the age of 25 years." After certain annuities to specified persons, the testator appoints his wife guardian of his children during their minority, and in the event of her death one W. was appointed, and the executors were directed to pay the said W., while she is such guardian, "the sum of \$1,000 per annum, to be charged against the shares of the child or children she is guardian of." Clause 16 provides for the event of another child or children being born—no doubt the birth of one was known to be imminent—and says: "Should I have another child or children, I direct the following provisions to be made for the support, maintenance, or education thereof; the sum of \$3,000 each per annum to be paid to the mother or other guardian until the age of 14 years is reached, from the age of 14 years to 21 years \$5,000 per annum, from the age of 21 years to 25 years, in the case of a son \$25,000 per annum, in the case of a daughter \$12,000 per annum. After the age of 18 years is reached payments can be made personally to any child, even though under age, and such child's personal receipt shall be a sufficient discharge therefor."

Pausing here for a moment, I am of the opinion that the sum directed to be paid to the guardian is in addition to the sums provided for the "support, maintenance, or education" of the child; the fact that after 18 the child's receipt is sufficient does not militate against this view, but I think, if anything, it supports it.

Then comes clause 18, which has given rise to the difficulty here. It is as follows: "18. I direct that as each child attains the age of 25 years, his or her income from my estate is to be during the 10-year period of accumulation hereinafter provided for, his or her proportionate part of 90 per cent. of the income of my estate after all charges are paid (excluding always as hereinafter directed the income of

my business), it being my intention that my children are to share equally in such income, but until each child attains the age of 25 years what would have been his or her share is to accumulate and form part of my general estate."

In the original will clause 18 had read: "I direct that as each child attains the age of 25 years his or her share of the income from my estate is to be during," etc., but the words underlined were struck out, and this properly initialled. I do not think this of any weight, even if I were at liberty to use the original will and not confine myself to the probate thereof.

The will then continues: "19. I direct that for the 10 years after my death the surplus income of my estate, after paying the annuities and other charges and amounts to be paid, shall be allowed to accumulate, and at the expiration of such 10 years 10 per cent. of the total amount of my estate exceeding \$2,500,000, but not exceeding \$400,000 in all, shall be set apart and be paid out of my personal estate to the Brockville General Hospital for the purpose of establishing a home for indigent Protestant old women who are bona fide residents of Canada and without adequate means of support, one-sixth to be appropriated for building and site and equipment, and the remainder for an endowment fund.

"It is my wish that full provision be made for the support and maintenance of the said old women, including, besides anything else which the directors, governors, or trustees of said hospital may deem necessary or proper for their comfort, clothing, spending money, medical and other attendance, and funeral expenses, to be paid for out of the income of such endowment fund.

"20. I direct that the revenue and income from my said business, whether in the form of a joint stock company or companies or otherwise, shall not be paid over as part of the income of my estate, but that the surplus income of said business, after making all proper allowances and provisions, shall be accumulated from year to year and invested and form part of the capital of my estate from which the income to be paid over under this will is to be derived.

"21. I give, devise, and bequeath all the rest, residue, and remainder of my property of every kind (including the amounts reserved to pay annuities as they cease to be required) to be disposed of as follows. Subject to the preceding provisions, including those as to accumulation and the

times of being entitled to payment, the income each year is to be divided between my children equally share and share alike; on the death of each child his or her children shall be entitled in equal shares to the same proportion of the capital of my estate as he or she was entitled to of the income, and the same shall be paid over by my executors accordingly (the issue of any who may be dead leaving issue to take their parent's share), but should he or she die without issue the same share or proportion shall belong to my estate.

"I further direct that all of such payments of income to my children are to be without power of anticipation or charging or disposing of, and are intended for the support and maintenance of themselves and their families, and in case of females for separate use."

The will had previously provided that the executors should "set apart an ample amount from the principal of my estate to provide for full payment of the annuities given in this (paragraph 11) and other paragraphs."

The estate at the time of the death of the testator consisted of a very large amount invested, of certain real and personal property not necessary to be here considered, and of the profitable business referred to in the will.

It is contended by the plaintiff that upon the true interpretation of the said will, and in particular of paragraphs 18, 19, and 21 thereof, the differences between the annuities directed to be paid to each of the children of the testator while under the age of 25 years, and the full one-third shares of the surplus income of the estate after carrying into effect all the directions of the said will, including the direction to accumulate 10 per cent. thereof for the period of 10 years, for the purposes in the said will set forth, which would have been payable to each of the said children respectively had they been all of the full age of 25 years at the date of the death of the testator, do not accumulate for the benefit of such children respectively, and are not payable to them upon attaining the full age of 25 years respectively, but fall into the general estate to be accumulated and invested, and that the full proportionate share of the income derived therefrom from time to time is payable to those children who have attained the age of 25 years, that is to say, that each child having attained the age of 25 years is entitled to be paid the full one-third of the surplus income of the

estate, including one-third of the income derived from the investment of the said differences, subject to the 10 per cent. accumulation hereinbefore referred to.

It is contended on the other hand that upon the true interpretation of the said will, and in particular of paragraphs 18, 19, and 21 thereof, the difference between the annuities directed to be paid to or set aside for each of the children while under the age of 25 years, and the full one-third shares of the surplus income of the estate of the testator, do accumulate for the benefit of such children respectively, and are payable to them upon attaining the age of 25 years respectively, so as to carry out the true intention of the testator, namely, that his children should each have an equal share in the total income of the said estate.

The case came in for hearing at the non-jury sittings at Toronto on Monday 9th December, 1907. I had the assistance of very able arguments by counsel concerned, and have since the argument read and re-read the will several times. My opinion has fluctuated from time to time, and I cannot say that I am at all sure that I am right in the view I have finally arrived at, but I do not think that there would be any change in that view if I were to reserve judgment longer.

The intention of the will seems to be that there shall be a sharp distinction made and retained between the business and the remainder of the estate. The business (clause 5) is to be continued by employing the profits and proceeds thereof, but not by using any of the capital or income of investments—clause 20 providing that so much of the revenue from that source as may not be needed for carrying on the business shall not be paid over as part of the income of the estate, but be invested and become part of the capital of the estate. The capital of the estate then will be composed of (a) the existing investments and the increase therefrom as mentioned in clause 4, and (b) investments made from the surplus income from the business.

From the principal of this is to be formed, set apart, a fund to provide for the payment of all annuities: clause 12 *ad fin.* It is not necessary to refer specially to the other annuities, but those given to the children must be considered. It is apparent that the testator intended to give to each of his children a certain fixed sum until such child should be

25 years of age, clause 10 providing for the children then in esse, and clause 16 for those in posse. The sums so provided are annuities, and, with other annuities, are to be paid from the income of this annuity fund.

At the time the will was made the plaintiff was, as has been said, about 21, and her sister about 19; it was apparent that each would come to the age of 25 years before the expiration of a 10-year period for which the testator intended to provide. When any child became of the age of 25 years, his or her claim upon the annuity fund ceased *ipso facto*, and a new provision needed to be made. If the testator had the thought that under the age of 25 no child of his should have the right to any more than \$12,000 or \$25,000, as the case may be, and ought not to have more than that sum to spend or otherwise dispose of, and if he also had the thought that the estate was to be divided, as far as possible, year by year, he certainly had the right to make a will which would have the effect of bringing about this result.

The accumulation spoken of is brought about in the first place by taking the balance of income of the annuity fund after paying the annuities, taking also the net income from the remainder of the estate (always excepting the capital, etc., employed in the business), and therewith forming an accumulating fund. So long as all the children are under 25 no draft need be made upon this fund to pay them an income, but at 25 the child must look elsewhere for it, and clause 18 is introduced accordingly.

It is declared to be the intention of the testator—generally—that the children are to share equally in the income of the estate (see clauses 15 and 21); so that there need be no difficulty in the words “her proportionate part.” The provision then is for the child arriving at 25 and losing the right to look to the annuity fund, by computing 90 per cent. of the income from the estate, dividing this by the number indicating the number of children, and the quotient is the amount the child is entitled to receive. This happening the first year after the attaining of the stated age, what is to be done with the other fraction of the income of the estate? The express provision is that “it being my intention that my children are to share equally in such income, but until each child shall attain the age of 21 years what would have been his or her share is to accumulate and form part of my general estate.” It is to be noted that the words here

are not "what would have been his or her income from my estate," but "his or her share." These shares or proportions of the 90 per cent. of the income are directed to accumulate and to form part of the general estate. Had the directions stopped at the word "accumulate," it may well be that this should be held to mean, accumulate for the benefit of the child under the age of 25 years and until attaining that age. There is no explicit direction of that kind, and there is an express provision for accumulation. Whether, independently of the closing words of clause 18, "and form part of my general estate," the provision as to accumulation in clause 19 would have had any effect upon these sums, I need not consider. An express provision, such as, that what would under other circumstances have been the share of a person shall form part of the general estate, is, to my mind, too clear to be disregarded or to have any but the one interpretation. No assistance can be derived from the use of the words "general estate" in clause 18—it is found nowhere else in will or codicil—the word "estate" is found in clauses 3, 4, 11, 12, 14, 18, 19, 20, 21, and 22, and twice in the codicil.

Nothing in the subsequent part of the will relieves me from the necessity of finding that the intention of the testator was that for the period of 10 years during which the accumulation was going on, a child 25 years of age or more should receive an aliquot part of 90 per cent. of the net income, but the aliquot parts to which the younger child or children would otherwise have been entitled should "lapse," and such child or children be compelled to look to the annuity fund for all moneys he or she had any right to. This provision may, at the time the will was made, have been a beneficial one for such younger child or children—there is no evidence as to the condition of the estate at that time—or it may, as I have suggested, have been for some other good reason the deliberate policy of the testator. With all that I have nothing to do; all I am concerned with is to find out from the language employed what the testator really meant. A man may do what he likes with his own.

The provisions of clause 21 are expressly "subject to the preceding provisions, including those as to accumulation and the times of being entitled to payment, the income each year is to be divided between my children equally share and share alike." No doubt an argument may be based upon

the expression "the times of being entitled to payment," as indicating that the provision in the latter part of clause 18, now under discussion, was intended to provide simply for a time of payment, and not for the interest or right in the income from the estate of the child under 25. But that argument cannot avail against the express provision that what would have been a share shall form part of the general estate.

The succeeding provision had at the trial a strong influence upon my mind, "at the death of each child his or her children shall be entitled in equal shares to the same proportion of the capital of my estate as he or she was entitled to of the income, and the same shall be paid over by my executors accordingly." It seemed to me that the result might be that a child might die under 25 leaving issue, and that if the argument I am giving effect to were sound, such issue would receive a very small part of the estate. The daughter, being entitled to \$12,000 out of an income say of 10 times as much, dying under 25 leaving issue, that issue would be held to be entitled to receive only 10 per cent. of the estate. But it may be that there did in fact exist at the time of the making of the will some good reason for this, or that the exact effect of such a provision was not considered at all. The provision has nothing of the absurd about it, and further consideration has convinced me that this provision cannot be allowed to modify the express words of clause 18.

Another provision, namely, that for the payment to W. of the sum of \$1,000 while she is guardian of an infant child or children, may also be referred to as affording an argument that a child under 21, and therefore under 25, might have a "share" beyond the annuity given. But this difficulty, if it be one, is got over by considering that the sum of \$1,000 is to be paid out of the sum payable yearly for the support, maintenance, and education of such child or children.

I think the plaintiff is right in her contention. If I had given effect to the contention of the defendant Sheriff, the question would arise as to the right of this defendant to receive the annuity of \$12,000 to which the plaintiff is no longer entitled, and also one-third of the 90 per cent. This consideration, I think, supports the conclusion at which I have arrived.

As to costs, this matter was proper to be brought before the Court, but the bringing of an action by writ instead of applying to the Court under the Rules is not to be encouraged.

I pointed out in *Willison v. Gourlay*, 10 O. W. R. 853, the practice which should be followed. For reasons there given, costs will be given to all parties out of the estate, but limited to costs as of an application under the Rules. No doubt in this particular instance the extra costs (if any) are a mere trifle as compared with the amount involved, but there is another consideration which solicitors should bear in mind. The people at large have to pay for the support of our courts of justice, and, while it is right and just that every litigant should have all the time necessary fully to develop and try his case, no one has a right to take up the time of a Court sitting for the trial of actions with questions such as these, when there is already a tribunal sitting charged with the duty of disposing of just such questions.

The time of the Court is taken up at the expense of the people. Moreover, other litigants who have come into the proper forum are delayed and put to inconvenience and expense improperly.

OSLER, J.A.

DECEMBER 12TH, 1907.

C.A.—CHAMBERS.

MCCANN MILLING CO. v. MARTIN.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Amount Involved—Review of Judgments below—Chattel Mortgage—Renewal—Validity—Time—Computation of Year.

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of a Divisional Court, ante 681, affirming judgment of MACMAHON, J., at the trial, ante 264.

W. R. Smyth, for plaintiffs.

A. Abbott, Trenton, for defendants.

OSLER, J.A:—The only question intended to be raised by the appeal is whether the renewal statement and affidavit of the amount due on the chattel mortgage, the subject of the action, was filed in time, within the meaning of sec. 18 of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 ch. 146, which enacts that "every mortgage . . . filed in pursuance of this Act shall cease to be valid . . . after the expiration of one year from the day of the filing thereof, unless, within 30 days next preceding the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee . . . is filed in the office of the clerk of the County Court." The chattel mortgage was filed on 26th April, 1904. When did "the term of one year from the day of the filing thereof" expire? "From," according to all modern authorities, when a particular time is given from a certain date within which an act is to be done, would exclude the day of filing, and therefore the year from the day of filing began at the earliest moment of the 27th April, 1904, and expired at midnight of the 26th April, 1905. And the renewal statement, to be valid, must have been filed within 30 days next preceding the expiration, not the day of the expiration of that year, and therefore a filing of the statement at any time on the 26th, as it here was filed, would be sufficient. The late Mr. Justice Patterson would evidently have taken this view of the construction of an Act, as in *Thompson v. Quirk*, noted in 18 S. C. R. 696 (appendix), and reported in *Cameron's Supreme Court Cases*, p. 436, he expressed the opinion, obiter no doubt, that under a North-West Territories Ordinance similar in terms to our former Chattel Mortgage Act, providing that the mortgage should cease to be valid after the expiration of one year from the filing thereof, the whole day of the original filing was excluded from the computation of the year, which, perhaps, had not been so held by our Courts: see *Armstrong v. Ausman*, 11 U. C. R. 498. Nothing now seems to turn upon the hour of the original filing, as by 57 Vict. ch. 37, sec. 14, the language of the section was changed as it now appears.

Cases upon the renewal of writs of execution, e.g., *Bank of Montreal v. Taylor*, 15 C. P. 107, have no application, for they turn partly upon the application of the rule that a judicial act such as the issuing of execution is, in contemplation of law, deemed to have taken place at the earliest

moment of the day on which it is done, and partly upon the general rule that the word "from" may be either inclusive or exclusive, according to circumstances, and that these, for the reasons assigned by the learned Judge (Wilson, J.), who delivered the judgment in the case referred to, required it to be construed as inclusive in computing the year from the teste of the execution for the purpose of its renewal.

The amount in question here is not large, and I am unable to suggest any reason for thinking that the judgment of the trial Judge, affirmed without dissent by the Divisional Court, is wrong. I therefore refuse leave to appeal. Costs must follow, to the respondents.

CARTWRIGHT, MASTER.

DECEMBER 13TH, 1907.

CHAMBERS.

McKENZIE v. SHOEBOOTHAM.

Jury Notice—Irregularity—Cause Removed from Surrogate Court into High Court—Terms of Order Removing—Time for Filing Jury Notice.

Motion by plaintiff to set aside a jury notice filed and served by defendant.

Grayson Smith, for plaintiff.

H. L. Drayton, for defendant.

THE MASTER:—On 6th December instant an order was made, on plaintiff's application, transferring this action from a Surrogate Court to the High Court, to be tried at Woodstock. The motion to transfer was opposed by the defendant, and her solicitor filed an affidavit that the case could not be ready for the non-jury sittings at Woodstock commencing next week, and that defendant required a trial by jury. The order directed that the pleadings and proceedings "do stand in the same plight and condition in which the same are now in said Surrogate Court."

The plaintiff on 7th instant gave notice of trial for the non-jury sittings to be held next week, and on 9th instant defendant served a jury notice, which prevents the case being set down. Plaintiff now moves to set the jury notice aside as irregular.

The cause was at issue in the Surrogate Court on 20th November, and, if the words of the order are to be construed in their natural sense, the jury notice was too late. Seeing what was stated in the affidavit of defendant's solicitor, it is unfortunate that the point was not made clear in the order. But, looking at the Surrogate Courts Act, R. S. O. 1897 ch. 59, sec. 35, it would seem to be open at any time for either party in such a case as the present to move for a jury. But until that has been done the language of the order seems to make the jury notice irregular, and it must be set aside and the plaintiff be at liberty to set the case down for the sittings on 19th instant. This will be, of course, without prejudice to any application by the defendant to the trial Judge or otherwise as she may be advised. Costs in the cause.

MULOCK, C.J.

DECEMBER 13TH, 1907.

TRIAL.

DOCKER v. LONDON-ELGIN OIL CO.

Landlord and Tenant—Lease—Right to Drill for Oil—Construction of Lease—Covenants—Breach—Commencement of Operations—Alternative Payment of Rent—Forfeiture—Relief—Ceasing to Operate—Payment into Court—Costs.

Action for a declaration that a certain lease of land made by the plaintiff to one Steele, and by the latter assigned to the defendants, was void.

C. St. Clair Leitch, Dutton, and J. C. Payne, Dutton, for plaintiff.

J. B. McKillop, London, for defendants.

MULOCK, C.J.:—The lease is dated 18th June, 1902, and by it the plaintiff demised the land therein mentioned for 10 years from the date of the lease, the lessor to receive by way of rental a one-eighth part of all oil and minerals obtained by the lessee and his assigns from the demised premises during the continuance of the demise, and also \$50 a year for each gas well from which the lessee should obtain and sell gas to the public.

The lease contains, amongst others, the following clauses and covenants:—

“This lease is made for the purpose of enabling the lessee and his assigns, and he is and they are hereby authorized and empowered, to sink or drill oil wells,” etc.; “and to dispose of all oil,” etc.; “and the lessor hereby grants, assigns, transfers, and sets over to the lessee and his assigns all such oil,” etc.; “subject only to the payment of the rental hereinbefore reserved;” the lessee “covenants with the lessor and his assigns in manner following, that is to say, that the lessee or his assigns, so long as he or they shall be of opinion that any wells sunk by him or them upon the said premises are yielding and will continue to yield, or will, if worked, yield, oil in sufficient quantities in his or their opinion to induce the lessee or his assigns to work and continue working the same, will: (a) pump and work the same faithfully and uninterruptedly unless hindered,” etc.; (b) “he will keep books of account,” etc.; (c) “will deliver to the lessor or his assigns in bulk one-eighth of all oil or mineral removed by the lessee or his assigns,” etc.; and (d) “will commence operations upon the said premises on or before the first day of November, 1902, or will pay to the lessor or his assigns the sum of \$6 per month from the date hereof until operations are commenced on the said premises: provided that the said term hereby granted shall cease and determine if the lessee or his assigns shall wholly cease for the space of 6 months continuously to operate under this lease: proviso for re-entry by the said lessor for non-payment of rent or non-performance of covenants.”

The plaintiff: . . . charges that neither the lessee, nor his assigns, the defendants, ever commenced to operate on the demised lands, or paid to the plaintiff . . . \$6 a month from the date of the lease, and that, by reason of the breach or non-performance of the covenants above quoted

and of the non-payment of "rent," the plaintiff is entitled to have the lease forfeited.

The defendants contend that they were not obliged unconditionally to commence operations on or before 1st November, 1902, but that it was optional with them either to do so or to pay . . . \$6 a month until the commencement of operations.

The facts are not in dispute. The defendants did not commence operations on or before 1st November, 1902, but, in lieu thereof, paid to the plaintiff, who accepted the same, the monthly sums agreed upon, computed from the date of the lease down to 1st November, 1902; they also paid further sums accruing due after 1st November, 1902, the last of such payments, so far as appeared at the trial, being an item of \$36 paid on 27th January, 1905. Evidently some arrear had accumulated, for defendants bring into Court \$216, which they say satisfies all moneys owing up to the commencement of this action, but the plaintiff refuses to accept the same, contending that he is entitled to have the lease declared at an end. This contention he rests on the following grounds: (a) breach of covenant to commence operation on or before 1st November, 1902; (b) non-payment of rent; (c) the defendants ceasing for 6 months to operate.

As to the first ground . . . I do not construe the covenant as an unconditional one to make such commencement, but an alternative covenant to do one of two things, namely, either to make such commencement or to pay \$6 a month from the date of the lease until 1st November, 1902.

When a person, as here, is bound to perform one of two things, he may elect which he will perform: *Layton v. Douglas*, 1 Doug. 16. The defendants have elected not to commence operations, but to pay the monthly sums. To give effect to the plaintiff's contention would involve disregarding the words "or will pay to the lessor or his assigns the sum of \$6 a month from the date hereof until operations are commenced on the said premises." These words are part of the covenant, they represent part of the contract between the parties, and proper effect must be given to them. The plaintiff has not the right to elect which thing the defendants should perform. Such is not the contract. The lessee covenanted to do one of two things—not the one which the

lessor should choose, but the one which he himself should choose. If he does either, he performs his covenant. He has done one, namely, paid the rent. I therefore think the defendants were guilty of no breach of contract because of not having commenced operations on or before 1st November, 1902. The plaintiffs evidently at one time took this view of the contract, for he accepted payment for the period up to 1st November, 1902. The covenant does not entitle the plaintiff to such payment and at the same time to re-enter because of default in commencement of operations. The acceptance by the plaintiff of the "rent" in payment for what he contends is the defendants' default (but in which contention I am unable to agree with him) in itself estops him from advancing a claim for forfeiture.

I am, therefore, of opinion that the plaintiff has no cause of action because of operations not having been commenced on or before 1st November, 1902. Thereafter the contract is silent as to any obligation to make commencement, but merely provides that the lessee shall pay the monthly sum of \$6 until there be a commencement. From time to time payments of this kind were made. Both parties have treated these moneys as "rent," the plaintiff's receipts so describe them, and by his statement of claim he charges that the "rent" is in arrear, and that in consequence he is entitled to re-enter. But whether or not these sums are "rent" is immaterial. The plaintiff claims the right to re-enter because of the non-payment of money. This right to re-enter is a penalty for non-payment, and nothing has been done which would make it inequitable to relieve the defendants from forfeiture of the lease because of non-payment, provided all arrears with interest are now properly paid. The plaintiff gave no evidence as to the amount in arrears, nor challenged the sufficiency of the amount paid into Court, and such payment, I think, should be held to relieve the defendants from forfeiture of the lease.

Plaintiff's counsel contended that the real object of the lease was to secure to the plaintiff the operation of the lands for mining purposes, and that, therefore, no equitable relief could be given to the defendants, because of their default in payment of the rent, and be relied upon the words quoted above from the lease: "This lease is made for the purpose of enabling the lessee, his heirs and assigns, and he

is and they are hereby authorized and empowered, to sink, drill," etc. The fair meaning of these words is not to create a duty on the lessee to operate, but merely to confer upon him the right to do so, and therefore they in no way modify the nature of the alternative covenant above quoted, which is the only provision in the lease obliging the defendants, and then only in the alternative, to operate.

As to the last ground of complaint, namely, that the defendants have ceased for 6 months to operate under the lease: to cease implies a beginning: they never began, and therefore could not have ceased; and this ground fails.

The action is, therefore, dismissed with costs since payment into Court: up to that time the plaintiff to have his costs; the money in Court to be available to answer defendants' costs, and any balance to be paid to plaintiff.

DECEMBER 13TH, 1907.

C. A.

REX v. LEE GUEY.

Criminal Law—Keeping Disorderly House—Common Gaming House—Summary Trial—Jurisdiction of Police Magistrate—Right of Accused to Elect to be Tried by Higher Court—Provisions of Criminal Code.

Case stated by the police magistrate for the city of Hamilton. On 10th June, 1907, the defendants (three Chinamen) were brought before the magistrate upon a charge that they did at Hamilton unlawfully keep, maintain, and use a disorderly house, to wit, a common gaming house, by keeping for gain a certain house, or room known as 35 John street north, for playing therein at games of chance and mixed games of chance and skill, and in which a bank was kept by one or more of the players exclusive of the others, and were tried by the magistrate summarily, without their consent, and in opposition to their request to be tried by a Superior Court, and were convicted of the offence charged, and sentenced to pay a fine of \$100 each, which

fines were paid under protest. The question reserved ~~was~~ whether the magistrate had absolute jurisdiction under ~~sec.~~ 774 of the Criminal Code to try defendants without ~~their~~ consent, or whether they had a right to elect to be tried by a higher Court.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

A. M. Lewis, Hamilton, for defendants.

J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.:—That a common gaming house was a disorderly house and an indictable nuisance at common law there can be no doubt. It was treated as being in that respect on the same plane as a common bawdy house, and is so referred to in the British statute of 25 Geo. II. ch. 26, which speaks of “persons having the care, management, or government of any bawdy house, gaming house, or other disorderly house,” language which finds an echo in ~~sec. 228~~ (2) of the Code: and see *Jenks v. Turpin*, 13 Q. B. D. 505, 514.

Under the Code such a house is expressly declared to be a disorderly house, and the keeping of it is an indictable offence which may be prosecuted before a jury upon an indictment or before the County Court Judge under the speedy trials sections, part XVIII. of the Code.

The question raised by the case reserved is, whether a police magistrate has not also absolute and summary jurisdiction to try the offence under the summary trials clauses, secs. 773 and 774, part XVI., a jurisdiction which he undoubtedly possesses in respect of the offence of keeping a disorderly house of another character, viz., the common bawdy house or house of ill fame. The answer to the question depends upon the proper construction and meaning of the expression “disorderly house,” having regard to its collocation with the other words of the section. The same expression is found in other sections, a reference to which and comparison with the language of secs. 773 and 774 will aid us in ascertaining its meaning.

Section 225 defines a common bawdy house as being a house, room, set of rooms, or place of any kind kept for the purposes of prostitution; sec. 226 defines a common

gaming house, and sec. 227 a common betting house. These sections are found in part V. of the Code, under the sub-head "Nuisances." Section 228 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps "any disorderly house," that is to say, any common bawdy house, common gaming house, or common betting house, as hereinbefore defined. Section 228 (2) enacts that any one who appears, acts, or behaves as the master or mistress or as the person having the care, government, or management of "any disorderly house" shall be deemed to be the keeper thereof, and shall be liable to be prosecuted as such. Section 229 penalizes every one who plays or looks on while any one is playing in "a common gaming house." Clauses (a) and (d) deal with the offences of wilfully preventing or using any contrivance to prevent a constable duly authorized to enter "any disorderly house" from entering the same; and clause (e) of the same section, with the securing by any bolt, chain, or other contrivance any external or internal door of or means of access to "any common gaming house" authorized to be entered by a constable.

Under the heading "Vagrancy" we find sec. 238, which enacts that "every one is a loose, idle, or disorderly person or vagrant who is (j) a keeper or inmate of a disorderly house, bawdy house, or house of ill fame, or house for the resort of prostitutes, or (k) is in the habit of frequenting such houses, and does not give a satisfactory account of himself or herself." Section 239 makes such a person liable, on summary conviction, to a fine not exceeding \$50 or to imprisonment for any time not exceeding 6 months, or to both.

In part XVI. of the Code, which deals with the summary trial of indictable offences, sec. 773 (f) enacts that when any person is charged before a magistrate with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill fame, or bawdy house, the magistrate may determine the charge in a summary way, and sec. 774 makes his jurisdiction in that case absolute, and not dependent upon the consent of the person charged; and sub-sec. (2) of that section declares that the provisions of part XVI. shall not affect the absolute summary jurisdiction given to any justice or justices in any case by any other part of the Act.

The case appears to me to be a very plain one for the application to secs. 773-4 of the rule of *ejusdem generis*, or its congener—the rule as to the construction of associated words, *noscitur a sociis*—and to call for the limitation of the term “disorderly house” to one of the class or character of those specifically mentioned in the words which immediately follow it, viz., house of ill fame or bawdy houses. Where the legislature meant that the compendious expression “disorderly house” should have the general and distributive meaning attributed to it in sec. 228, it has shewn that it knew how to say so by using the term without qualification or limitation, which adds force to the argument that where the general phrase is followed by or associated with the enumeration of specific words, as in secs. 238 and 773, 774, the ordinary rule of construction was intended to apply, and that the former was to take its colour and meaning from the latter and to be read in a qualified or limited sense as confined to the classes specified, in the present instance houses of ill fame or bawdy houses. It shews, as Lindley, M.R., said in *In re Stockport Schools*, [1898] 2 Ch. 687, the type the legislature was referring to.

Section 238 (k) is the only clause, so far as I am aware, which penalizes the habitual frequenter of a disorderly house, house of ill fame, or bawdy house, and sec. 774 (2) saves the absolute summary jurisdiction given to any justice or justices by any other part of the Act, which is probably that given by sec. 238, though under that section the prosecution would in form be for the offence of vagrancy, and the offender liable to a milder punishment. In either case it appears to me that the disorderly house meant is that specifically mentioned, and that the absolute summary jurisdiction of the magistrate is limited to that case.

The precise point now before us came before the Court of Queen's Bench (Quebec), appeal side, in *The Queen v. France*, 1 Can. Crim. Cas. 32, where it was decided, Bossé, J., dissenting, that the expression was thus limited, and that the magistrate had no jurisdiction to try summarily the offence of keeping a common gaming house. The reasoning of Wurtele, J., who delivered the judgment of the Court, based upon the authorities and the history of the legislation on the subject, seems to me entirely satisfactory. I cannot follow the Chambers decisions in British Columbia and the Yukon.

The conviction must, therefore, be quashed, and the questions (in the terms put by the magistrate) answered: (1) that the magistrate had not absolute jurisdiction to try the defendants without their consent; and (2) that they had the right to elect to be tried by a higher Court.

The result is, as in *The Queen v. France*, that, as there was no legal trial, the accused must be tried before the proper tribunal.

MEREDITH, J.A., gave reasons in writing for the same conclusions.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

THE
ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, DECEMBER 26, 1907.

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C. A.

REX v. EDMONDSTONE AND NEW.

CORRECTION.

Hardy v. Sheriff, ante at p. 1046. Delete the paragraph beginning "Pausing here" and ending "supports it."

And he, speaking for the jury, answered: "We mean, inflicting the blow with the bottle as described, but not guilty of robbery." And, on being further asked, "Which prisoner?" they said, "Both." And the Chairman entered the verdict on the record: "The jury find both prisoners guilty of assault as charged, but not guilty of robbery;" interpreting, as the case stated, the verdict and explanation to mean that the prisoners were guilty of the wounding charged in the indictment. One of them was then sentenced to 30 months in the penitentiary and the other to 18 months in the central prison, a sentence which could not have been legally imposed upon a conviction for an assault.

There was evidence that the complainant had been struck on the head with a bottle by the prisoner Edmondstone, and severely wounded.

The questions stated for the Court were whether the verdict had been rightly recorded, and whether it had been rightly interpreted.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

M. J. O'Reilly, Hamilton, for the prisoners.

J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.:— . . . Section 951 of the Criminal Code, 1906, enacts that every count shall be deemed divisible, and if the commission of the offence charged as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved.

This was sec. 713 of the Criminal Code of 1892, of which Taschereau, J., in his annotated edition, p. 819, observes that it is an extension of sec. 191 of ch. 174, R. S. C. 1886, under which, upon the trial of any person for any felony whatever, if the crime charged included an assault against the person, though not charged in terms, the jury might acquit of the felony and find a verdict of guilty of assault against the person indicted. Under corresponding Imperial legislation it was held that upon an indictment for aggravated robbery, i.e., robbery accompanied with violence, as in the case mentioned in sec. 446 of the Code, the person charged, though acquitted of the robbery, might be convicted of a common assault, though not of an assault constituting a substantive felony: *Regina v. Burrit*, 1 Den. C. C. 185; *Regina v. Reid*, 2 Den. C. C. 88; and see *Regina v. Smith*, 34 U. C. R. 552, 560, per Wilson, J.

Under the section as it now stands, there is nothing that I can see to prevent the jury, if they acquit of the robbing, from finding on such an indictment as we have before us, awkwardly framed as it is, a verdict of common assault under sec. 291 of the Code, or of unlawful wounding or inflicting grievous bodily harm under sec. 274, for the prisoners are charged not only with an assault simpliciter in connection

with the robbery, "by means of violence then and there used by them against the person of the said T.," etc., but the indictment concludes with the words, "and that at the time they so robbed the said T. . . as aforesaid they did wound the said T.," etc.

I am not satisfied that a verdict of assault occasioning actual bodily harm, under sec. 295, could have been found upon this indictment. The statutory offence charged—robbery—does not include it, nor is it technically charged in the count, as the offence of wounding is.

The commission of the offence charged includes, as charged, the commission of the other two offences I have mentioned, either of which the jury might have found by their verdict.

If they had simply found the prisoners guilty of assault, which was their verdict as they first announced it, that would, in my opinion, have been a good verdict of common assault, the minor offence, and the least and lowest of that nature for which they could have been convicted; and in favour of supporting the verdict, as well as in favour of the accused, it must have been so interpreted, unreasonable as such verdict would, upon the evidence, appear to have been.

The verdict actually recorded, however, "guilty of assault as charged," introduces an element of uncertainty, as we are obliged to look at the indictment to discover what is meant. The jury may have meant to find a common assault, or they may have meant an unlawful wounding, for, looking at the indictment, "assault as charged," though not the appropriate technical language for describing the offence, might mean either. They should have been required to find expressly one way or other—common assault or unlawful wounding.

The questions reserved by the Chairman must, therefore, both be answered in the negative, viz., that the verdict was not rightly recorded, and was not rightly interpreted.

The result is that the conviction must be quashed, but the case is clearly one in which a new trial should be granted on the whole record, as the assault cannot be inquired into except as connected with an alleged robbery.

The prisoners will thus have an opportunity of being entirely acquitted if they can persuade the jury of their innocence, or of being convicted of the aggravated robbery, involving a possible sentence of imprisonment for life and

whipping, or of unlawful wounding, which I rather infer from what the foreman of the last jury said when interrogated by the Judge, was what that jury really meant to find, and so in the end justice is likely to be done.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

SCOTT, LOCAL MASTER.

DECEMBER 16TH, 1907.

CHAMBERS.

O'MEARA v. OTTAWA ELECTRIC CO.

Parties—Joinder of Defendants—Negligence—Joint Liability—Pleading.

Motion by the defendant company, in an action brought by Catherine O'Meara, administratrix of the estate of Philip O'Meara, deceased, against the company and John Labatt, for an order requiring the plaintiff to elect against which of the defendants she would proceed.

G. F. Henderson, Ottawa, for the defendant company.

W. Greene, Ottawa, for defendant Labatt.

Harold Fisher, Ottawa, for plaintiff.

THE LOCAL MASTER:—This action is brought to recover damages for the death of the plaintiff's husband. Deceased was an employee of defendant Labatt, a brewer, and was killed by an electric shock received while operating a machine for washing bottles, driven by electricity supplied to the premises by the defendant company.

Paragraph 9 of the statement of claim reads as follows: "9. The plaintiff says that the condition of affairs by which electricity reached the said brush and killed the said Philip O'Meara, resulted from the negligence of both defendants, and claims that both defendants are jointly liable for the death of the said Philip O'Meara."

The 10th paragraph alleges, in the alternative, that the death resulted from the negligence of either of the defendants.

By the succeeding paragraphs the mode of supplying electricity to the machine is described, and the following acts of negligence are alleged: (1) that electricity having too high a pressure was supplied to the premises from the street wires; (2) that the transformer was of an antiquated and unreliable make; (3) that the transformer was not properly inspected; (4) that no precautions were taken to guard against a failure on the part of the transformer to do its work, neither its secondary wires nor the interior wiring being grounded, and no other safety device supplied; (5) that the motor was not properly installed, the brush being in direct connection with the motor, instead of being connected with an insulated coupling or by means of a belt; (6) that the frame of the motor was not grounded; (7) that the motor was never inspected, and had in fact been defective for some time prior to the accident.

Then paragraph 18 reads: "The plaintiff claims that both defendants are responsible for all the acts of negligence specified."

And paragraph 19: "The plaintiff . . . says that all the defects and negligence complained of arose from or were not discovered or remedied owing to the negligence of the said defendants"

So far as the form of the pleading is concerned, a joint liability could not be alleged in clearer terms. It is, however, contended that the acts of negligence specified, which are presumably all that the plaintiff proposes to rely on, are all assignable to either the one or the other of the defendants; that no one of them is a thing for which the two defendants would be jointly responsible; and that it is not sufficient in order to raise a joint liability for the plaintiff to shew that distinct acts of negligence on the part of the two defendants respectively contributed to cause the accident. Even assuming that I could in a proper case go behind the form of the pleading and find that, though a joint liability was in terms set up, no such joint liability could follow from the facts relied on, I could not possibly do so here. To say that for no one of the alleged acts or omissions could both defendants be jointly liable would be to try the case. In *Hinds v. Town of Barrie*, 6 O. L. R. 656, 2 O. W.

R. 995, Mr. Justice Osler rests his judgment explicitly on the absence of any allegation of joint liability in the pleading, and even suggests that the plaintiff may still amend by setting up a joint cause of action. The two cases of *Collins v. Toronto, Hamilton, and Buffalo R. W. Co.* and *Perkins v. Toronto, Hamilton and Buffalo R. W. Co.*, ante 84, 115, 263, are very much in point. See also *Brown v. Town of Toronto Junction*, ante 750.

The motion must be dismissed with costs in the cause to the plaintiff. The defendants will have 5 days to plead.

MABEE, J.

DECEMBER 16TH, 1907.

TRIAL.

CROWN BANK OF CANADA v. LONDON GUARANTEE AND ACCIDENT CO.

Guarantee—Fidelity Bond—Security against Dishonesty or Negligence of Bank Clerks—Theft by one Clerk—Negligence of another Permitting Theft—Liability of Guarantor in Respect of Both—Amount Recovered by Bank—Right to Deduct Expenses of Recovery—Construction of Bond.

Action to recover from the defendants \$11,000 on a fidelity bond.

W. Cassels, K.C., and F. Arnoldi, K.C., for plaintiffs.

G. F. Shepley, K.C., and C. Swabey, for defendants.

MABEE, J.:—The action arises out of the following facts. On 9th December, 1905, Edwin S. Banwell, paying teller in the plaintiffs' Toronto office, absconded, taking with him \$40,350.33, made up as follows: mixed Canadian notes, \$515; unsigned Crown Bank notes, \$20,000; Crown Bank notes duly signed, \$17,785; Dominion notes, \$500; Bank of England notes, \$72.33; British gold, \$643; and American gold, \$835.

The defendants had given to the plaintiffs a bond guaranteeing a large number of employees in various amounts appearing in the schedule, Banwell in the sum of \$5,000, and

tract provides that the defendants, to the extent set opposite the name of each employee in the schedule, should make good and reimburse the bank for all and any pecuniary loss sustained by the bank directly occasioned by dishonesty or negligence, or through disobedience of direct and positive instructions, given by an authorized official, on the part of such employee in connection with his duties in the bank's service. Provisions are made putting mere errors of judgment outside the contract, likewise injudicious exercise of discretion. The following clause was said to be material: "This policy and the liability of the company does extend to cover all and only such acts, defaults, or negligence of an employee in the performance of his duties as shall render him legally liable to indemnify the employer, only, however, to the amount of such sums as the employee could be held liable for."

The printed rules of the bank for the guidance of employees were put in, and from these it appears that provision is made for the proper checking of the paying teller's cash each day. I find as a fact that it was Maunsell's duty to check and certify to Banwell's cash at and for some time prior to the defalcation, and that he had been going through the form of so doing. The cash book shews he had gone through the form of checking the cash on the day the money was stolen by Banwell, and the book contains his initial certifying that all the cash was on hand. The mode adopted was at the close of the day's business for Maunsell to enter the teller's cage, inspect, and satisfy himself that all the cash the teller was accountable for was on hand, and initial the account, whereupon the cash box was locked, there being two separate locks and keys, and placed in a compartment in the vault, it also being locked with separate keys. I find that on the day in question Maunsell was guilty of negligence in not properly checking and counting the cash in question; that Banwell must have abstracted the cash either before Maunsell went through the empty form of checking it, or that Maunsell, by his negligence and omission of duty, furnished Banwell with the opportunity of stealing the money after it had been checked over, and under either head Maunsell was guilty of negligence and was disobeying direct and positive instructions, and this negligence and breach of duty resulted in Banwell's defalcation.

The absconder left Toronto on a Saturday afternoon; the theft was not discovered until Monday morning; the bank thereupon took active steps to follow Banwell, and a long time afterwards, and after the expenditure of a great deal of money, located him in Jamaica, from which place he was brought back to Toronto; he pleaded guilty, and was sent to prison. Neither Banwell nor Maunsell was called as a witness upon the trial of this action. The bank recovered from Banwell in money and jewelry \$37,968.24; he had expended some of the money stolen in the purchase of jewelry, and this was returned by the bank to the persons from whom Banwell had purchased it, and the money returned, except as to a purchase of \$645, which, from the statement filed, appears to be still in the bank's possession. To effect Banwell's capture and recover the stolen property the bank expended \$8,163.35, in travelling expenses, constables, detectives, and solicitors' charges. It is said the bank are now \$10,545.44 out of pocket, together with interest to be added.

The position taken by the defendants is that they are in no way liable for any neglect of Maunsell; that his omission (if any) was not the direct cause of the loss to the bank, but the intervening crime of Banwell; and as to the loss occasioned by the act of the latter, the defendants say the bank, having recovered from him \$37,968.24, and the \$645 of jewelry they have on hand, must credit these sums against the total defalcation, and that upon doing so their loss is less than \$1,750, and, while denying all liability, they bring into Court \$2,500.

Dealing with the first contention as to any liability as to Maunsell, I am of opinion that Maunsell's act created a liability upon the bond. Mr. Shepley contended that the proximate cause of the loss was not the act of Banwell, and relied upon . . . Baxendale v. Bennett, 3 Q. B. D. 525, where the crime of a third person, and not the negligence of the defendant, was said to be the proximate or effective cause of the fraud. This case is cited in a judgment of Lord Alverstone in the late case of *De La Bere v. Pearson*, [1907] 1 K. B. 483, where the law is defined as follows: "If the defendant's breach of contract or duty is the primary and substantial cause of the damage sustained by the plaintiff, the defendant will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, and although that wrongful conduct may

primary and substantial cause of this defalcation was the negligent act or omission of Maunsell; had he performed the duty he owed to the bank, this theft could not have been committed. Had Banwell abstracted the money before Maunsell entered the cage, any reasonable inspection or counting would have disclosed the fact; had the money been placed in the box and locked by Maunsell, after a proper counting, still the money could not have been taken; so, to my mind, it is impossible to escape the conclusion that the primary and moving cause of the fraud was attributable to Maunsell. The defendants are liable to the extent of \$11,000 for the negligence of Maunsell and the fraud of Banwell.

Then as to the second point, must the plaintiffs or the defendants bear the expense of recovering the stolen property? The only case I have been able to find anything like the present is that of *Hatch, Mansfield, & Co. v. Nenigott*, 22 Times L. R. 366, not cited upon the argument. There the defendant had given to the plaintiffs a letter in the following terms: "I am willing to hold myself responsible for my son C. Nenigott's fidelity, whilst he remains in your employment, up to the sum of £250." The son from time to time stole £269 worth of cigars from the plaintiffs; he was arrested and prosecuted to conviction by the plaintiffs, and an order was made for the restitution of £114 worth of cigars; the net costs incurred by the plaintiffs in the prosecution and in tracing the thief amounted to £98; and it was held that this sum could be deducted by the plaintiffs from the £114 before giving the defendant credit for it under the guarantee. The main point considered by the judgment is as to whether the course taken was a reasonable one.

Now, when Banwell fled, the plaintiffs were not bound to take any steps to follow him; they could have left that to the defendants to do, in which event certain expenses would have had to be paid by the defendants. It is true, by reason of the large sum taken over and above the amount of the guarantee, the plaintiffs were greatly interested in locating the absconder, and recovering the booty, but I am unable to see upon what principle of law the defendants are able to say, as against their bond, that they are entitled to the benefit of the plaintiffs' efforts.

If the case depends upon what was reasonable to be done, as apparently did the *Hatch* case, I think, subject to some-

thing I shall say further on, that the course taken by the plaintiffs was an entirely reasonable one. The defendants were liable for \$11,000, and, as is stated in the Hatch case, if they allege that that loss has been diminished, it lies upon them to make that contention good. The defendants do not suggest any other or better course for the plaintiffs to have taken, but insist simply that the gross sum recovered must be applied upon the loss. I do not think so.

So long as what was done was reasonable, I think the plaintiffs have the right to take from the sum recovered the expense of the recovery, and credit the balance upon the total loss.

I have gone through the cases cited by Mr. Shepley; they mostly turn upon the special facts in each one.

Baker v. Garrett, 3 Bing. 60, failed because the plaintiff had given no notice to the sheriff that he intended to sue the pledger. Bardwell v. Lydall, 7 Bing. 489, at the conclusion of the judgment is put upon the ground of a specific appropriation of payment. Colvin v. Buckle, 8 M. & W. 680, and Walker v. Hatton, 10 M. & W. 249, both turn upon the form of the covenants.

In Rownshay v. Falkland Islands Co., 17 C. B. N. S. 1, the Court thought the costs incurred were not a necessary consequence of the defendants' wrongful act, and that the costs may have been unnecessary.

Tindall v. Bell, 11 M. & W. at p. 232, is stated to be a case turning upon a question of fact and not of law.

Harris v. Eldred, 42 Vermont 39, though not binding. I have looked at, and find the case is put upon the ground that there was no law which governed the costs relating to the process the plaintiff had invoked, and that there was no contract relation between the parties by which there was any express or implied contract for indemnity.

It was contended that the liability of the defendants to the plaintiffs is, under the portion of the contract above extracted, limited to the sum the plaintiffs could recover from Banwell and Maunsell, but I have found no case to the effect that a person robbed cannot deduct from the money he gets back, when the robber is captured, the expense of the capture, and sue for the difference. No case was cited for that proposition. I think that Banwell and Maunsell would be liable to the plaintiffs for the expense properly incurred in making recovery from Banwell.

Evidence was not given at the trial as to the various items that make up the expenditure incurred, and it was said some of them would be entirely improper, but as to this I cannot say. It was therefore arranged that as to the exact amount properly expended there should be a reference if the parties could not agree, if I came to the conclusion that the plaintiffs were entitled to deduct any of the expenses.

The result, in my view, is that the course taken by the plaintiffs having been reasonable, they are entitled to deduct all reasonable and proper sums disbursed from the sum recovered from Banwell, and that the defendants are liable for the shortage up to \$11,000. If the parties cannot agree upon the amount, there will be a reference. The defendants will be entitled, upon payment to the plaintiffs of the amount found due, to have the jewelry in the plaintiffs' possession that was taken from Banwell.

The plaintiffs are entitled to their costs down to judgment; and costs of the reference and further directions will be reserved.

TEETZEL, J.

DECEMBER 16TH, 1907.

TRIAL.

BECHTEL v. ZINKANN.

Trust and Trustees—Company Shares Held in Trust for Several Persons—Action by one Cestui que Trust to Compel Transfer of his Portion — Parties — Interests of Remaining Cestuis que Trust—Terms of Trust — Discharge of Trustee Piecemeal.

The defendant was trustee for plaintiff and 6 others (one of them being himself) of 15 shares of the 200 shares of the capital stock of the Silver Spring Creamery Co. These shares were issued in part payment of the purchase money for the assets of another company in which the cestuis que trust held stock amounting in all to \$1,060. The plaintiffs holding amounted to \$430, so that his interest in the 15 shares was a trifle over 6 shares.

The action was to compel the defendant to transfer to the plaintiff 6 shares, damages for refusal, and an account

of moneys received by the defendant as such trustee for the plaintiff's use, and not paid over.

A. Millar, K.C., for plaintiff.

C. L. Dunbar, Guelph, for defendant.

TEETZEL, J.:—For the defendant it was contended that one of several *cestuis que trust* could not compel a trustee to be relieved of his trust in piecemeal or to apportion a part of the trust property and transfer it to the plaintiff.

Snow v. Snow, 3 Mad. 10, is authority for the proposition that where the trust fund is a certain ascertained sum of money of which the plaintiff is entitled to an aliquot part, he may maintain an action against the trustees to recover his aliquot share without making the other beneficiaries parties.

I am unable to apply the principle of that decision to the present case, because, while it is plain that where the subject of the trust in an ascertained sum of money, the payment to one of the *cestuis que trust* of his share could not affect the rights of the others or the value of their shares, it does not follow that where the subject of the trust is stock, the rights and interests of the others interested may not be affected by transferring a portion to one of the beneficiaries.

The defendant, as holder of the 15 shares, has a voting power in respect of them, and circumstances might easily arise where he would hold the balance of power between rival factions and thus be able to control the election of the directors and the business policy of the company, while he might not be able to do so without the 6 shares. Then there is the fact that 4 of the *cestuis que trust* would upon a subdivision of the shares be entitled to less than one share each, which would leave them without a voice in the affairs of the company, for there is no provision in law for a holder of less than one share being entitled to vote at meetings of the company. Under the trust arrangement each beneficiary has an interest in the franchise that may be exercised by the trustee with reference to the 15 shares, and no order should be made in their absence which might in any way impair or prejudice the value of their holdings.

Evidence was given at the trial that all the other *cestuis que trust* object to the transfer being made to the plaintiff.

Independently of the question of the interests of the unrepresented cestuis que trust, I am of the opinion that under the circumstances of this trust the defendant cannot be compelled to discharge his trust in detail. The defendant is simply a trustee for convenience, holding the shares in trust for the plaintiff and others, no provision being made for sale or division, and no time being fixed during which he is to hold. As stakeholder of the property he must hold the scales evenly and see that the rights of the several parties are mutually respected: Underhill, 6th ed., p. 296.

In *Goodison v. Ellison*, 3 Russ. at p. 594, Lord Chancellor Eldon expressed the view that a trustee could not be called on from time to time to divest himself of different parcels of the trust estate so as to involve himself as a party to a conveyance to many different persons, and he puts this question: "Has not a trustee a right to say, 'If you mean to divest me of my trust, divest me of it altogether, and then make your conveyance as you think proper.' I have been accustomed to think that a trustee has a right to be delivered from his trust if the cestui que trust calls for a conveyance."

This case is cited in *Godefroy on Trusts*, 3rd ed., p. 583, as an authority for the proposition that a trustee cannot be required to convey the estate piecemeal at various times. See also *Lewin on Trusts*, 8th ed., p. 860.

The action must be dismissed with costs.

DECEMBER 16TH, 1907.

DIVISIONAL COURT.

TINSLEY v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Nonsuit.

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiff on the findings of a jury, for \$800 with costs.

The plaintiff on 1st January, 1907, between 12 o'clock midnight and 1 o'clock in the morning, was crossing College

street at the corner of University avenue, in the city of Toronto, for the purpose of boarding a west-bound car, when in attempting to cross in front, believing it would stop, he was run down by the car. Plaintiff sustained a fractured skull and was confined to the hospital for some weeks. The action was brought to recover \$5,000 damages. The jury found negligence on the part of the motorman in not stopping when signalled.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.
D. L. McCarthy, for defendants.
J. H. Denton, for plaintiff.

BOYD, C.:—The jury have found that the defendants were guilty of negligence: (1) for not stopping when signalled; and (2) for not having the car under control when approaching crossing. They exculpate the plaintiff and give \$800 damages.

Upon a consideration of the evidence, it appears to be very plain that the plaintiff walked into a place of danger. Any one who seeks to cross a track directly or diagonally in front of a coming car must use ordinary vigilance. Here this plaintiff saw the car speeding towards the corner of College street and University avenue when it was 300 feet away, as he estimates; he was seen to be stepping off the curb and heading across the street diagonally from the south when the car was about 150 feet off, as Shepherd says; and so both moved on, he across the street, and the car on the track, till he was struck by the foremost end of the car. This occurred at one in the morning, when the view was unobstructed all along College street to Yonge street, and the car was moving rapidly (as all night cars run), with head-light flashing and full of people. The plaintiff admits having an unobstructed view of the car, and indeed says it was in full view as he passed diagonally across the street, getting closer to the track where he was struck. He says he had to go 30 feet and another 30 feet after he saw the car (60 feet), and it was in full view of him all the time. The car he could see and he could hear, as it made a noticeable rumbling noise quite apparent. He makes no point as to the speed of the car: he says he cannot tell whether it was going fast or slow. He could have halted—he could have turned aside, even at the last moment, and avoided the im-

pact. The car coming at the pace it did must keep straight on, and could not slow up instantaneously, as the man might have done. Why did he act so heedlessly? No excuse given except this, that he saw two people waiting for the car at the street corner, and he thought it was going to stop. It was argued as if the evidence reported him as having himself signalled to stop. That is not in the stenographic report before us: all that appears is that Shepherd at the corner gave a signal to stop (which the motorman says he did not see): plaintiff did not give a signal, and does not say that he saw any signal given by the other. There was no rule, custom, or practice as to slowing down or stopping at crossings in these night-runs, unless on the requirement of persons getting on or getting off the cars. So that the situation comes to this: the plaintiff thought or inferred or supposed that the car was about to slow up or stop at the crossing, but his senses, sight and hearing, would inform him that the car was not slowing; against what he saw and heard or might have seen and heard (for he was in possession, he says, of all his faculties), he acted on an assumption—in other words, he took chances of getting over ahead of the rapidly moving car, and failed. Can he be said to be acting with due care? Was his conduct not (to put it in the mildest way) heedless? Was he not the victim of his own disregard of consequences? Did he not in a very distinct way contribute to his own hurt? It is not needful to say that he was most to blame—if he in fact contributed to the injury he cannot recover.

Such seems to be the proper result of all the evidence given on his behalf—and his case is not bettered by the further evidence given for the defence.

It follows, in my opinion, that the action should have been dismissed.

As to authorities, the case of *Allen v. North Metropolitan Tramway Co.*, 4 Times L. R. 561, appears to be very close to the facts now in hand. That was acted on by the Court of Appeal in *Follett v. Toronto Street R. W. Co.*, 15 A. R. 346, 353; see also *City of Halifax v. Inglis*, 30 S. C. R. 280.

The nearest case relied on by the plaintiff is *Cranch v. Brooklyn R. R. Co.*, 107 App. Div. N. Y. 341 (1905). It is distinguished in two respects: (1) that the plaintiff was going over the track on a private right of way, seeking the station to take a train at a highway crossing, and it

was held that the plaintiff need not in such a place use the same circumspection and care as a traveller crossing a railroad track on a public highway (pp. 342, 343); and (2) that the defendants by their manner of operating the line, i.e., being in the custom of stopping at the station, created a condition of things, known to the plaintiff for 16 years, which justified the belief that the train would not run across the highway without stopping (pp. 343, 350). To counter-balance the New York case I may refer to a New Jersey case, *Jewett v. Patterson R. R. Co.*, 62 N. J. Law 434 (1898).

I follow the principle of decision in the Allen case, and would dismiss the action. It is not a case for costs.

MABEE, J., concurred, for reasons stated in writing.

MAGEE, J., dissented, for reasons also stated in writing.

Moss, C.J.O.

DECEMBER 16TH, 1907.

C. A.—CHAMBERS.

BELLEVILLE BRIDGE CO. v. TOWNSHIP OF
AMELIASBURG.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court — Special Grounds — Assessment of Bridge—Assessment Act—Ultra Vires — Bridge Constructed under Dominion Legislation over Navigable Waters.

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of a Divisional Court (ante 988) dismissing appeal from judgment of Boyd, C. (ante 571), dismissing action to recover taxes paid (under protest) by plaintiffs to defendants in respect of an assessment of a toll bridge.

E. G. Porter, Belleville, for plaintiffs.

W. S. Morden, Belleville, for defendants.

Moss, C.J.O.:— . . . The motion is made under sec. 76, sub-secs. 1 (g) and 2, of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2. and the applicants must shew

that there are special reasons for treating the case as exceptional and allowing a further appeal. In this, I think, they have not succeeded. With the possible exception of the suggested point that the Assessment Act is ultra vires in so far as it assumes to render assessable a bridge such as the one in question, constructed, under the authority of Dominion legislation, over navigable waters, every question raised is settled by decisions. One was rendered as long ago as 1869, the others at comparatively recent dates, but all support the conclusion of the Chancellor and the Divisional Court in this case. If the question of the validity of the Act has been properly raised, an appeal lies to the Court without leave under sub-sec. (d), but I do not observe that the point was touched upon by the Chancellor or the Divisional Court. And in reality the question probably is not whether the Act is or is not ultra vires, but rather whether such an interest or right of property as the plaintiffs own is within its terms. That portion seems to have been dealt with and settled not for the first time in this case.

However, this motion can only be dealt with on the hypothesis that leave is necessary in order to entitle the plaintiffs to prosecute an appeal to this Court. And upon the materials before me, dealing with the case in that view, I am unable to conclude that the case is one in which leave should be given to further review the judgment sought to be appealed from.

Motion dismissed.

ANGLIN, J.

DECEMBER 17TH, 1907.

TRIAL.

GIBSON v. MACKAY.

Physician and Surgeons—Services—Operations and Medical Attendance—Quantum Meruit—Poor Patients—Promise of Defendants to Pay for Services—Scale of Remuneration—Payment into Court—Costs.

Action to recover the value of surgical and medical services rendered to 5 unfortunate sailors, who were terribly

frost-bitten, on the shores of Lake Superior after the wreck of the steamer "Golspie" in December, 1906. The defendants were managing agents for the company which owned the wrecked steamer. The sailors were, by direction of the defendants, brought to Sault Ste. Marie, and were placed in the hospital at that town, in charge of the plaintiff, who was, according to the evidence, in considerable practice and a somewhat distinguished surgeon in Sault Ste. Marie and its neighbourhood.

M. McFadden, Sault Ste. Marie, for plaintiff.

G. T. Blackstock, K.C., for defendants.

ANGLIN, J.:—At the close of the trial I stated that I might find it desirable to avail myself of the services of assessors, under sec. 101 of the Judicature Act. Further consideration, however, has convinced me that this case may be disposed of without such assistance. . . .

The particulars of the plaintiff's claim as delivered are as follows:—

"1906.

14th December. Thorburn. Amputation through both feet, metatarsal bones of one, tarsal bones of the other leaving the heels, which were thought might be left to granulate. Granulation did occur in one heel, and it was found necessary to amputate for the other on or about the 13th day of February, 1907. This constituted one of what is referred to in the statement of claim as "afterwards through one leg below the knee."

14th December. Green. Amputation through both legs below the knee.

14th December. Downing. Amputation through both feet, carpal bones in one and what is known as "Symes amputation" in the other. Later, on or about the 13th day of January, 1907, a second operation was performed on him, as in the case of Thorburn.

14th December. Keeling. Amputation through tarsal bones below one extremity and through the other leg below the knee.

14th December. McDonald. Amputation through both legs below the knees and through both hands, leaving the thumb in one case.

Time averaged in each operation about 40 minutes. 14 amputations in all.

Paragraph 2.

Daily visits and attendance, the time each day varying with amount to do, from a half to three hours each day. In the cases where the heels were not removed, there were gangrenous ulcers, which needed dressing. McDonald suffered from constitutional troubles and broncho-pneumonia, from which he died on or about the 30th of December, 1906, after the wreck, needed daily medical as well as surgical attendance.

Paragraph 3.

Dr. J. R. McLean assisted at the various operations or amputations as indicated above, and the amount \$70 charged is for service for such assistance.

Paragraph 4.

Dr. Shepard gave anæsthetics on 7 occasions, as indicated, viz., once to Green, Keeling, and McDonald, and twice for Thorburn and Downing, charging \$5 for each occasion."

For the services mentioned in paragraph numbered 1, the plaintiff demands the sum of \$1,400, computed at the rate of \$100 for each operation performed. For the services mentioned in paragraph numbered 2, he asks the sum of \$500; and for those set out in paragraphs 3 and 4, the sums of \$70 and \$35 respectively.

The defendants in pleading denied liability; but with their defence they paid into Court the sum of \$800 as "sufficient to pay the plaintiff for the services rendered by him."

At the trial, however, they admitted liability, and the sole question for determination now is the proper sum to be allowed to the plaintiff for his professional services.

The defendants also admit that the plaintiff's claim for \$70 paid Dr. McLean and \$35 paid Dr. Sheppard is correct, maintaining that the sum of \$695 is more than the plaintiff is entitled to recover for his own services.

In addition to himself, there were called as witnesses for the plaintiff Dr. Sheppard and Dr. McCabe, of Sault Ste. Marie, Ont., and Dr. Webster, of Sault Ste. Marie, Mich. For the defendants Dr. Cockburn and Dr. Gilray, both of Hamilton, Ont., gave evidence.

The opinions of these professional gentlemen differ markedly as to the nature and proper classification of several of the operations performed by the plaintiff, and still more widely as to the proper basis of remuneration for all the operations.

All these professional gentlemen, however, agree that there is no tariff or legal scale of charges for surgical or medical services, and that it is a recognized and well established custom in the profession, that a person occupying the station in life of a workman or wage-earner, should not be expected to pay the same fees as are expected from a person occupying a higher social position—a person of means—affluent or at least independent. They do not, however, agree as to the extent to which consideration is to be extended to the humbler or poorer class of patients. Indeed, the witnesses for the plaintiff maintain that they make their charges against poorer patients the same as against well-to-do patients, but expect to collect from the former only a portion of the charges made. This practice, if it actually obtains, was, I think, very properly characterized by the learned counsel for the defendants as “a fiction.”

In considering the question of quantum meruit upon an implied contract to pay for the services of a physician, the extent of legal liability must, in my opinion, be measured by what the physician would reasonably expect to receive and the patient reasonably expect to pay, rather than by any fictitious entry or making of charges designed perhaps to create a colourable uniformity in scale of fees non-existent in fact. Drs. Cockburn and Gilray frankly state that they charge patients in the humbler walks of life, who are yet able to pay a fair charge, from 25 to 50 per cent. of what would be charged well-to-do patients, and they assert that this is the recognized and established practice of the profession.

The plaintiff and his witnesses maintain that all the 14 operations performed by the plaintiff were major operations, for which the plaintiff is entitled to charge \$100 a piece, being the full professional fee, which they say they charge to every patient, rich or poor, for such operations, though from the latter they would expect actually to receive a smaller remuneration. The plaintiff and Drs. Webster and McCabe agree in asserting that where a well-to-do person makes himself liable to a surgeon for his remuneration for services rendered to a patient from whom, if paying out of his own pocket, the surgeon would expect a much smaller fee, the well-off person, so becoming liable, should reasonably and properly be asked and expected, in the absence of any agreement or understanding as to the quantum of the surgeon's

charges, to pay upon the same scale or basis as he would if the like services had been rendered to himself.

The defendants' witnesses, on the other hand, say that it is the recognized custom of the medical profession in such cases to charge against any third person thus rendering himself liable, the same fees which the patient, if able to pay, would himself have been expected to give. Dr. Sheppard's evidence rather supports this view.

Here again, in determining what is the extent of liability upon an implied contract such as that with which I am dealing, I think the Court must ascertain not only what the professional gentlemen would reasonably expect to receive, but also what the intending debtor would reasonably expect to pay. Applying this double test, it seems to me much more reasonable that one who, out of kindness or charity, renders himself liable to pay a surgeon for his services to another—who is himself unable to pay—would expect to pay what the surgeon might fairly ask from the patient if himself paying the bill, rather than a fee based upon what the physician might look for had the service been rendered, not to the indigent patient, but to his wealthy or comparatively wealthy patron. And he would, in my opinion, be a most unreasonable surgeon who, whatever his wishes, would actually look for or expect greater remuneration. In other words, the extent of the liability contemplated by both parties to the implied contract would be what the professional gentleman should fairly charge and expect to obtain for his services from a person in the class and station in life to which the patient belongs.

Then the witnesses for the defendants both say that in the case of Thorburn the two operations on the 14th December were not major operations. For the two amputations through the feet Dr. Cockburn would allow \$25 a piece. Dr. Gilray would allow \$20 and \$25. Both also say that the two operations on Downing on the 14th December were not properly classed as major operations. They would allow for the amputation through the carpal bones \$25 and for the "Symes amputation" \$30. They agree in these figures. In the case of Keeling they both say the amputation through the tarsal bones was not a major operation, and would allow \$25 for it. In the case of McDonald they agree that the operations upon the hands were not major operations. Dr. Cockburn would

allow for these \$25 a piece; Dr. Gilray \$20 and \$25. The other operations, these surgeons say, are properly classified as major, and they would allow for each of them \$50. These fees they say are on a liberal scale and are the maximum fees which surgeons in good repute would charge to or expect to obtain from persons comparatively poor or humble, yet more affluent, or of better social position, than were these poor sailors.

Having regard to what I feel constrained to characterize as the extravagant evidence of the professional gentlemen called for the plaintiff—one of them did not hesitate to swear that if offered the sum of \$1,000 to perform the surgical work done by the plaintiff within 8 hours on the 14th December, he would have refused, although another would not say that he would have declined to undertake it for \$600, and at least two of them pledged their oaths to the statement that, in their opinion, it would be fair, just, and honest, without stipulation therefor, if possible, to exact from a charitably disposed person, who had made himself responsible for the remuneration of a surgeon rendering services to an indigent patient, twice or even 3 or 4 times the fee which could have been reasonably expected from a person occupying the same station in life as the patient, if able to pay what for him would be a fair fee—I must accept as more reliable and entitled to greater credit the testimony of the surgeons called on behalf of the defendants, both as to the character of the operations performed and as to what should be a fair remuneration therefor. For these operations Dr. Gilray would allow \$520; Dr. Cockburn, \$530. I allow the latter sum. In view of the fact that of this sum of \$530, \$430 is allowed to the plaintiff for his services rendered between the hours of 11 a.m. and 7 p.m. on the 14th December, the liberality of his remuneration is apparent. For his services rendered during these eight hours the plaintiff's bill was \$1,200.

As to the services covered by paragraph 2 of the particulars, the somewhat extraordinary circumstance is admitted that in sending in his first bill in June the plaintiff demanded only \$1,505, making no separate charge for these services. Upon the defendants asking for some particulars of this account, he, in August, rendered a bill in which he made an additional charge of \$500 for medical treatment for these patients. Excepting McDonald, who died on 30th December,

the sailors appear to have remained in the hospital until 1st June. The plaintiff charges for services up to 1st April.

The evidence is that unless unusual and unexpected complications arise after an operation the surgical and medical services usually incident to the convalescent stages succeeding the operation are not made the subject of a separate charge, but are covered by the fee for the operation. These services, it is said, ordinarily extend over a period of 14 days. In cases where complications arise and where further operations are required, the surgeons agree that a further fee is properly chargeable. In an unusual protracted recovery, where a prolonged course of medical treatment is required, fees for such necessary attendance beyond the usual period are said to be also properly chargeable. In the present case, further operations upon two of the patients were found necessary, and the fees allowed for these operations would cover the usual and ordinary medical attendance which ensued upon them. There is no evidence that in the cases of these patients there was any further serious trouble; and in the cases of the other two patients there is no evidence that there were complications or difficulties at any time other than such as are very often incident to successful and "clean" surgical work. But, owing to the terrible nature of the injuries sustained and their debilitated condition, these unfortunate men, no doubt, did require somewhat protracted medical assistance and attention. Having regard to all the circumstances, including the fact that the plaintiff, when rendering his account in June, apparently thought that the fees for the operations might properly include the charges for subsequent attendance, sitting as a jury I think I shall do what is fair and just between the parties if I allow to the plaintiff for his prolonged medical attendance, beyond what is properly covered by the fees allowed for the operations themselves, the sum of \$160.

I therefore award to the plaintiff judgment for the sum of \$795 in all, \$530 for his surgical work, \$160 for his subsequent attendance as a physician and surgeon, and for the amount paid to Dr. McLean \$70 and for that paid to Dr. Sheppard \$35.

The plaintiff is entitled to his costs of action down to and inclusive of perusal of statement of defence; the defendants to their costs subsequent to delivery of statement of

defence, and payment into Court of the sum of \$800. The plaintiff's costs will be added to his claim, and the costs of the defendants will then be set off against the whole. The balance so ascertained will be paid to the plaintiff out of the money in Court, and the remainder of such money will be paid out to the defendants.

CARTWRIGHT, MASTER

DECEMBER 18TH, 1907.

CHAMBERS.

STONE v. STONE.

Evidence—Examination of Party as Witness on Motion for Security for Costs — Refusal to Answer Questions — Relevancy—Disclosing Defence.

Motion by plaintiff for an order requiring defendant to attend for re-examination as a witness upon a pending motion for security for costs and to answer questions which he refused to answer when examined, and other similar questions.

W. N. Ferguson, for plaintiff.

E. W. Boyd, for defendant.

THE MASTER:—In this action plaintiff asks to have it declared that property standing in her husband's name is hers. It is contended by him that she is resident out of the jurisdiction and should give security for costs, and he has moved for an order under Rule 1198 (b). The plaintiff desires to avail herself of the principle of *Stock v. Dresden Sugar Co.*, 2 O. W. R. 896, and cases cited. Both parties have been examined by the opposite side as witnesses on the pending motion for security. When so examined, the defendant said as follows in reference to the purchase of the property in question:—

“Q. Your wife, you admit, paid the \$2,300? A. Well. I got \$2,300 from her, I think; I don't know the amount exactly—she loaned me the mortgage.

“Q. Did she put up anything more for you? Witness declines to answer on the advice of counsel.

“Q. Have you paid her back that money? A. I have.

"Q. How? Witness declines to answer on advice of counsel." . . .

It was objected that defendant was being asked to disclose his defence. As the statement of claim has been delivered, and the statement of defence must set out the facts on which the defendant relies and he must submit to examination for discovery, I do not understand why it is thought to be so vital to prevent disclosure now. However that may be, I think the plaintiff is entitled to have the questions answered. The defendant admits receipt of \$2,300 at least, and he does not sufficiently avoid that confession by saying he has paid it back, unless he states how this was done. He should, therefore, attend for re-examination, unless he prefers to abandon the motion for security.

Marriott v. Chamberlain, 17 Q. B. D. 154, and Milbank v. Milbank, [1900] 1 Ch. 376, shew that where such an application as the present is proper "the information must be given even though it discloses some portion of the evidence on which the other party proposes to rely at the trial, and even where the plaintiff is privileged from producing documents which would disclose such evidence:" Odgers on Pleading, 5th ed. (1903), p. 179.

ANGLIN, J.

DECEMBER 18TH, 1907.

WEEKLY COURT.

RE CHAMBERS, CHAMBERS v. WOOD.

Will—Construction—Charitable Bequest—Gift of Income without Limitation of Time—Disposition of Corpus—Intention—Perpetuation of Trust.

Motion by the executors of the will of Nelson Chambers, deceased, for an order declaring the true construction of the will.

A. E. Haines, Aylmer, for the executors.

W. B. Doherty, St. Thomas, for the Amasa Wood Hospital.

J. M. Glenn, K.C., for the Corporation of the County of Elgin.

ANGLIN, J.:—The will . . . contains the following provisions:—

"Fourth, I hereby further will and direct that the sum of \$5,000 be put out at interest in some good and approved security or securities and kept so invested by my executors hereinafter named in this my will, upon trust to pay the interest thereof from year to year, to the Amasa Wood Hospital of St. Thomas, for the benefit of poor patients from the county of Elgin, who may from time to time become inmates of the said hospital, so long as the said Amasa Wood Hospital shall be used for an hospital. And in the event of the said Amasa Wood Hospital ceasing at any time for one year to be used for an hospital, then that the interest of the said \$5,000 shall be paid over yearly to the Poor House of the county of Elgin, to be expended therein for the benefit of the poor and infirm therein, from the county of Elgin, until the establishment of some other public hospital in the city of St. Thomas, when the said interest shall be paid to the said hospital, in the same way and for the same purpose as it was formerly paid to the Amasa Wood Hospital.

"Sixth, I further direct that all the above legacies shall be paid by my executors within one year after my decease."

The rule is incontrovertible that a gift of income without limitation of time is tantamount to and operates as a gift of the capital, in the absence of other disposition thereof. But this rule is subject to the qualification that a testator has the power of giving interest without vesting the corpus in the donee of the interest by expressing such an intention: Jarman, 5th ed., p. 805.

In the foregoing bequest the testator clearly manifests an intention to provide for the event of the Amasa Wood Hospital ceasing to carry on its work temporarily or permanently. He plainly intends that, should such a contingency occur, the income theretofore paid to the hospital shall be available for other charitable purposes. This involves the perpetuation of the trust of the fund, and sufficiently expresses an intention that the corpus of the fund shall not vest in or be paid over to the hospital trustees.

Mr. Doherty urges that the covenant of the municipality of the county of Elgin for the perpetual maintenance of the hospital, given as a term of its acquisition of the Amasa Wood property, ensures the perpetuity of that institution, and that its work will never be interrupted. While this

covenant, or which the testator may have been fully apprised, no doubt renders it highly improbable that the work of the hospital shall cease at any time in the future, that contingency cannot, in my opinion, even with such covenant, be deemed beyond the realm of possibilities.

If the gift over were to the municipal corporation for their own use and benefit, this fact would certainly afford a very strong argument in support of Mr. Doherty's contention, because, in that event, the municipal corporation would certainly not be allowed to benefit as a result of failure to observe their covenant to maintain the hospital. But the gift over to the municipal corporation is in trust for defined charitable purposes.

The testator's manifest intention that the gift of income to the Amasa Wood Hospital shall not carry with it the corpus, and the provision that in a certain contingency—however unlikely to arise—the income itself shall be diverted to other charitable purposes, in my opinion preclude the application of the rule above stated as to the effect of unlimited gifts of income. An order will issue containing a declaration in accordance with this view. Costs of all parties of this application will be paid out of the estate.

RIDDELL, J.

DECEMBER 18TH, 1907.

TRIAL.

BENOR v. CANADIAN MAIL ORDER CO.

Company—Managing Director—Salary—Claim for—Winding-up—Reference—Costs.

Motion by defendants to vary the judgment of RIDDELL, J., ante 899.

W. Proudfoot, K.C., and W. H. Grant, for defendants.

R. W. Eyre, for plaintiff.

RIDDELL, J.:—In this case my attention has been called to the report of *Birney v. Toronto Milk Co.*, 5 O. L. R. 1, 1 O. W. R. 736. While it may be that the case does not absolutely overrule *Re Ontario Express and Transportation Co.*,

25 O. R. 587, at least the authority of the last mentioned case is so shaken that I may give effect to my own view as to the law.

I think that, though Benor was named managing director, he was still a director, and that remuneration cannot be claimed by him, in the circumstances of this case. I follow the judgment of the late Mr. Justice Street in the Birney case. Reference may also be made to *Beaudry v. Read*, ante 622.

Certain additional facts in reference to the winding-up order has been also laid before me; these would simply affect certain of the statements in my former reasons for judgment, and in no way the result, so I do not further notice them.

The defendants desire a reference as offered them by the judgment.

Judgment will therefore be entered dismissing the plaintiff's claim so far as the \$1,800 salary is concerned; and directing a reference to the Master as mentioned in my written reasons, ante at p. 905.

The defendants will pay the costs of the action up to judgment, on the High Court scale, except so far as the same have been increased by the claim made for salary; the defendants to set off their costs solely applicable to the claim for salary. Further directions and costs reserved to be disposed of by myself. The judgment to be entered as of this date, for the purpose of appeal, etc.

MABEE, J.

DECEMBER 18TH, 1907.

TRIAL.

WATSON v. TOWN OF KINCARDINE.

Pleading—Amendment at Trial—Compensation for Improvements—Real Property Limitation Act—Additional Evidence.

Motion by defendants at the trial for leave to amend the defence, as stated in the judgment.

D. Robertson, Walkerton, for plaintiff.

J. H. Moss and W. C. Loscombe, Kincardine, for defendants.

MABEE, J.:—At the opening of the trial at Walkerton, Mr. Moss moved for leave to amend the statement of defence by adding a claim for compensation for improvements to the lands in question. The application was allowed to stand. At the close of the case motion was made for leave to set up the Real Property Limitation Act in answer to the plaintiff's claim. This was opposed by Mr. Robertson, who alleged that there was evidence available in answer to such a defence, but the plaintiff had come unprepared to meet that issue. I think I am bound to grant leave to the defendants to set up the statute: *Williams v. Leonard*, 16 P. R. 544, 17 P. R. 73, 26 S. C. R. 406; *Patterson v. Central Canada Savings and Loan Co.*, 17 P. R. 470. Leave may also go to add the claim for compensation for improvements, and any other amendment the defendants may desire.

The plaintiff may also reply or make any amendment to the statement of claim that he may be advised to make; in other words, both parties may make any amendments they deem proper. These amendments should be made within one month.

I will hear the additional evidence at the Stratford assizes in March next. The action need not be again entered for trial.

DECEMBER 18TH, 1907.

DIVISIONAL COURT.

McLEOD v. LAWSON.

Contempt of Court—Attachment—Disobedience to Judgment—Service of Judgment—Copy—Non-production of Original—Status of Plaintiffs as Applicants for Attachment—Parting with Interest in Part of Subject Matter of Action—Judgment Attacked by Subsequent Action.

Appeal by defendant Thomas Crawford from order of MEREDITH, C.J., directing the issue of a writ of attachment against the appellant.

S. R. Clarke, for appellant

J. B. Holden, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—By a judgment of the Court of Appeal, 1st October, 1906, it was amongst other things provided as follows:—

“(4b) And this Court doth further order and adjudge that the moneys paid into the branch or agency of the Union Bank of Canada at New Liskeard . . . be paid into Court . . . and that the plaintiffs and the defendants Lawson and Crawford do forthwith sign and deliver cheques upon the said bank for the purpose of the payment of the said money into Court as aforesaid.”

There is in the bank a sum of over \$20,000, and the plaintiffs and the defendant Lawson have signed a cheque (13th September, 1907). for the amount, pursuant to the judgment. The solicitors for the defendant Crawford were requested by the solicitor for the plaintiffs to have their client also sign this cheque; but this was not done. On 3rd October, 1907, the solicitor for the plaintiffs personally served the defendant Crawford with a true copy of the judgment, and tendered him the cheque for his signature. The defendant Crawford refused to sign, his solicitor, being then present, advising him to so refuse. It does not appear whether the original judgment was shewn to Crawford at the time, but it is not pretended that he did not know perfectly well what the judgment required him to do.

A motion was made for an order of attachment against the defendant Crawford for his refusal to obey the express order of the Court; the motion was granted and the order made by the Chief Justice of the Common Pleas; and Crawford now appeals.

In addition to the grounds taken before the Chief Justice, it was urged before us that it must be proved that the original order had been shewn to the defendant at the time of service of the copy; and Rule 333 was appealed to. I do not think that the provisions of the Rule apply to a case of this kind; but that the service as proved was perfectly good.

The chief ground urged before us was that the plaintiffs had parted with their interest in the subject matter of the action, and therefore they could not take these proceedings, and their assignees were not before the Court or parties to the

learned Chief Justice has pointed out that the assignment referred to is a transfer of a certain parcel of land, and that the money now in question has not been in any way dealt with by the assignment. The examination of **McMartin** is put in by the defendant, but this does not contain any statement that the money has been assigned or dealt with in any way.

It is urged that an action has been brought calling in question the judgment for the non-compliance with which it is sought to attach the defendant; but such an argument is utterly without weight.

The order appealed from is right, and the appeal will be dismissed with costs—the order for attachment not to issue for one week, to permit the defendant **Crawford** to comply with the judgment..

CARTWRIGHT, MASTER.

DECEMBER 19TH, 1907.

CHAMBERS.

SCHLUND v. FOSTER.

Discontinuance of Action—Rule 430—Proceedings after Delivery of Defence—Leave to Discontinue—Terms—Costs—Stay of Action in Foreign Court.

Motion by defendant to set aside a notice of discontinuance given under Rule 430 (1), and cross-motion by plaintiff for order under Rule 430 (4), if necessary.

C. W. Kerr, for defendant.

W. N. Ferguson, for plaintiff.

THE MASTER:—Since the delivery of the statement of defence to the amended statement of claim on 27th March, 1907, the plaintiff has taken several other proceedings, viz., delivery of further amended statement of claim, filing and serving jury notice, issuing order to produce, moving to strike out statement of defence, and changing his solicitor.

It is too plain for argument that plaintiff cannot avail himself of Rule 430 (1).

The plaintiff's jury notice was set aside on 25th October, and the defendant thereupon set the case down for trial at the non-jury sittings. But on 5th November the jury notice was restored by a Divisional Court, and on 12th November defendant gave notice of trial for the jury sittings commencing on 6th January prox. On 12th December instant the notice of discontinuance was served.

It was strongly argued that the notice of trial given by the defendant was of as great effect as if given by plaintiff, and that, therefore, the only power to allow a discontinuance was to be found in Rule 543.

The cases are collected in Snow's Annual Practice (1908), vol. 1, p. 330. There does not seem to be any case similar in its facts to the present. The language of Rule 430 (4) could not be wider than it is.

The only question, therefore, is, what terms should be imposed on making the order asked for by plaintiff? It appears that the plaintiff is a citizen of the United States, and, as such, has given security for costs and paid into Court \$200.

While the defendant in October was journeying to California, he was served with process in an action begun for this same claim by the plaintiff in the Court at Chicago. The defendant insists, as a term of the order, that plaintiff should undertake to abandon that action.

The reason given by plaintiff for wishing to discontinue this action and proceed with that at Chicago, is his inability to secure the services of solicitors and counsel or to give further security, owing to a change in his financial position. This, it is contended, is not an adequate reason, and reference is made to the case of *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670, where it was said by the Judicial Committee that in all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the action arose, ought to be resorted to. It was contended that the plaintiff adopted this course of taking action against defendant in the country of his residence properly, and should not be allowed now to abandon the forum which he had rightly chosen, and resort to one to which the defendant is not subject, and which only acquired jurisdiction by the fact of his having to pass through on his

way to California (see per Osler, J.A., in *Murphy v. Phoenix Bridge Co.*, 19 P. R. at p. 497).

On the other hand, it was urged that plaintiff is willing to pay all costs of this action, and that, as there is no power directly to prevent him from proceeding with his Chicago action, this Court ought not to do this indirectly by requiring him to desist from any other action as a term of allowing him to discontinue. It was said that costs are in all cases considered sufficient indemnity to a party who has been unsuccessfully attacked (see per Bowen, L.J., in *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. at p. 690). The plaintiff here is ready and willing to pay all costs which defendant is entitled to recover, and this is all that the Court can call on him to do. He never gave notice of trial, and so Rule 543 has no application unless he is bound by the act of the defendant, and, to use the language of the late Mr. Justice Kekewich in a similar case of *De Jong v. United Motor Co.*, 20 R. P. C. 472 (at p. 473), unless "the Court will hold that by deliberately doing nothing the plaintiff must be understood to have done something."

It seems to be sufficiently plain that the term asked for should not be granted. "The right to resort to the Courts for the redress of wrongs and injuries ought not to be interfered with or denied except in very clear cases and with the greatest caution:" per MacLennan, J.A., in *Great North West Central R. W. Co. v. Stevens*, 18 P. R. 392, at p. 393. This principle, as applied to an attempt to close the doors of a foreign Court to a citizen of that country, seems a fortiori.

The plaintiff may therefore have leave to discontinue, on payment in 10 days after taxation of all costs, including those of this motion, and consenting at once, on the certificate of the taxing officer being issued, to payment out of Court of the money paid in as security, or so much thereof as may be necessary to satisfy the certificate. The costs of getting the money out of Court to be costs in the action.

CLUTE, J.

DECEMBER 19TH, 1907.

TRIAL.

WELLS v. CITY OF PORT ARTHUR.

Street Railways—Injury to Person Falling from Car—Fare Not Demanded by Conductor—Willingness to Pay Fare if Demanded—Status as Passenger—Duty of Conductor—Misconduct—Proximate Cause of Fall—Avoidance of Kick Aimed by Conductor at Passenger—Responsibility of Owners of Railway—Negligence—Contributory Negligence.

Action for damages for personal injuries sustained by plaintiff, owing, as he alleged, to the negligence or misconduct of the conductor of a tram-car operated by defendants, in causing him to fall from the car.

F. R. Morris, Fort William, for plaintiff.

F. H. Keefer, Port Arthur, for defendants.

CLUTE, J.:—The jury was struck out by consent of parties.

On 13th April, 1907, the plaintiff was injured while riding on the defendants' railway under the following circumstances.

The plaintiff was a lineman on the telephone line owned by the city of Fort William, and was returning from his work. It would appear that an arrangement had been made whereby workmen in the employ of Fort William were furnished tickets at reduced rates, and such tickets had previously in fact been furnished to the plaintiff. On the occasion in question, however, he had no ticket. He got on the car in Fort William that afternoon, with the intention of riding home in the car, which passed his place. He stated that he had been allowed by conductors on previous occasions to ride free; that he knew the conductor well; that on the present occasion his fare was not demanded; that if it had been demanded he would have paid it. As the car approached his home, he went from the centre of the car to the rear platform, or vestibule, as it is called, and while there he and the conductor got into a friendly scuffle. It is

uncertain who commenced the scuffle, as the plaintiff and the conductor contradict each other on this point, but I do not think it material—it was of very little importance, and no harm was done. This occurred before the car reached Prichard street, which was the nearest point where the car stopped before reaching the plaintiff's home, and where he should have got off unless he intended to leave the car while in motion, which, however, he admitted he did. He had moved out to the steps as the car approached Prichard street, and stepped down off the car to allow a lady to alight, but not with the intention of leaving the car. He then stepped on the lower step of the car, holding on by both hands—the one on the brass rod across the window bar, and the other on the back of the platform. As the car was approaching his house, the conductor said to him, "Here is where you get off," and made a motion to kick the plaintiff. It was done in fun and with no intention of touching the plaintiff. The plaintiff naturally threw his body back to avoid the kick, and in so doing his feet slipped from the step, he still having hold of the rear of the car, his other hand having loosened from the brass rod across the window; he was flung backwards and inwards and was hit by the trailer and received serious injuries. The wheel of the trailer does not appear to have passed across his arm; otherwise, it was said, it would have crushed the bone, and the bone was not broken. It did, however, cut the large muscles of the right arm, and also made an ugly wound near the rectum about 1½ inches wide and 2 inches deep, and he received other bruises of a less serious character. He was knocked senseless and taken to the hospital.

The only medical evidence as to the effect and extent of these injuries was that of the doctor called by the plaintiff, who stated that his arm at present was of very little use, and he did not think he would recover the full use of it; that he received serious injuries in his back; that the principal nerve of the right leg was injured so that he would not have full control of his leg, nor would it be strong; that he did not think the plaintiff would again be able to do heavy work, and that he was wholly unfit to do the work of his former position as lineman. The plaintiff was receiving at that time \$3 a day.

I find the following facts: that there was no authority from the defendants to carry the plaintiff free; that he did

not have, on the occasion in question, a reduced rate ticket or any ticket; that he intended to ride as a passenger on the car, and did not intend to pay for his ride unless he was asked, but to pay if he was asked; that the conductor did not demand his ticket or pay for his ride; that the first scuffle had ceased before the car reached Prichard street; that the kick was made thoughtlessly, in fun, and without any intention of doing the plaintiff harm; that the effect of the conductor kicking at the plaintiff, while he was in the position in which he was, was the immediate cause of the accident which resulted in the injuries to the plaintiff complained of, by causing the plaintiff to try to avoid the kick by throwing back his body, thereby causing his foot to slip from the step of the platform before he was ready to alight. I find further that the plaintiff had intended to alight from the car while it was in motion, as he had frequently done before; that the car was going slowly; that he fell from the steps before he had intended to alight; and that the accident was not caused by the plaintiff attempting to alight while the car was in motion, but the immediate cause was that while the car was in motion he slipped from the steps by endeavouring to avoid the conductor's kick.

A nonsuit was moved for by Mr. Keefer, upon the grounds: (1) that the injury was caused by an act of the conductor not within the scope of his employment; (2) that in any event the plaintiff was guilty of contributory negligence.

The first question is, what was the duty which the defendants owed to the plaintiff under the circumstances in this case? As carriers of passengers the defendants are only responsible for negligence or breach of duty; and in this respect they occupy no different position from that of a railway company: *Canadian Pacific R. W. Co. v. Chalifoux*, 22 S. C. R. p. 731; *Readhead v. Midland R. W. Co.*, L. R. 2 Q. B. 412; in appeal, L. R. 4 Q. B. 379. . .

[Reference to 6 Cyc. 357, 536; *Beven on Negligence*. 2nd ed., pp. 1154, 1155, 1158, 1159; *Great Northern R. W. Co. v. Harrison*, 10 Ex. 376; *Austin v. Great Western R. W. Co.*, L. R. 2 Q. B. 442; *Foulkes v. Metropolitan District R. W. Co.*, 5 C. P. D. 157, 168.]

In the present case I do not think the plaintiff can be treated as a trespasser, for, although he was quite willing to ride without paying, he was willing to pay if pay were demanded.

In *McCann v. Sixth Avenue R. W. Co.*, 117 N. Y. 505, the Court of Appeals . . . held that where a conductor of a street car, kicking at a boy trespassing on the platform of a car, caused him to jump off the car and fall before another car, whereby he was injured, the company were liable.

The plaintiff undoubtedly intended to become a passenger on this car and to pay for his right to ride, if demanded, but not otherwise. It was the duty of the conductor to demand his fare in the usual way. He was not asked why he did not do so. It may have been forgetfulness; it may have been with the intention of allowing the plaintiff to ride free of charge. There was no evidence of collusion or fraud in the matter. Taking the view I do, that the plaintiff was willing to pay if his fare was demanded, I think he was a passenger on the car, with all the rights of one who had in fact paid his fare, and he was entitled, therefore, to the utmost care and diligence on the part of the defendants' servants to carry him safely. . . .

[Reference to *Coll v. Toronto R. W. Co.*, 25 A. R. 55; *Smith v. North Metropolitan Tramways Co.*, 7 Times L. R. 459.]

In the present case it was proved that it was part of the duty of conductors to see people get on or off the car safely. What was meant by this, I presume, was that it was their duty to take due care in respect of passengers getting on or off the cars. . . .

[Reference to *Coll v. Toronto R. W. Co.*, *supra*; *Bayley v. Manchester R. W. Co.*, L. R. 7 C. P. 415.]

The defendants . . . urge that the kick given by the conductor was given in mere caprice, and not in the course of his employment. . . .

If the conductor had demanded the plaintiff's ticket, and he had refused to give it, or to pay for his passage, he would not have been entitled, even then, to have kicked the plaintiff off the car while in motion; but, if he desired to put him off the car, his duty would have been to stop the car, and, without using more force than was necessary, to remove the plaintiff. He would have had no right to kick him while acting in the course of his duty in putting him off the car. The act here of kicking the plaintiff while he was standing on the steps was, I think, a direct breach of duty, which was to use reasonable care when passengers were alighting. It

does not appear to me to be any answer to say that the plaintiff had no business to attempt to get off the car while in motion. While that is true, it still remains that at the moment the accident occurred he was not getting off, and he did not voluntarily get off. It was the wrongful act of the defendants' servant which caused him to slip. . . .

[Reference to Boyle & Waghorn's Railways and Canals, vol. 1, p. 23; Willis v. Belle Ewart Ice Co., 12 O. L. R. 526, 8 O. W. R. 331; Cunningham v. Grand Trunk R. W. Co., 31 U. C. R. 350; Blain v. Canadian Pacific R. W. Co., 5 O. L. R. 334, 2 O. W. R. 76; Pounder v. North Eastern R. W. Co., [1892] 1 Q. B. 385, [1894] A. C. 419; Daniel v. Metropolitan R. W. Co., L. R. 5 H. L. at p. 55; Readhead v. Midland R. W. Co., L. R. 2 Q. B. at p. 421; Austin v. Great North Western R. W. Co., L. R. 2 Q. B. at p. 445; Beven on Negligence, 2nd ed., pp. 1211, 1212, and note.]

Suppose in the present case the conductor had been aware that another person was about to assault the plaintiff as he was alighting, or had seen him in the act of so doing, it cannot be doubted, I think, that it would have been his duty to intervene and to prevent the assault. The question then is: can the defendants' servant do that which it is his duty as a servant of the defendants to prevent another from doing, and not render the defendants liable? It was strictly within the course of his employment to take due care in respect of passengers getting on and off the car. In the present case it, indeed, was not his duty to assist the plaintiff off, but it was his duty, I think, as an officer of the company, to refrain from doing that which was likely to cause an accident. Was, then, his act of kicking the plaintiff, in the circumstances, likely to cause an accident in his alighting. I think it was, and for this breach of duty in the course of his employment the defendants should be held liable. . . .

[Reference to Wood on Railroads, vol. 2, secs. 313, 315; Spohn v. Missouri Pacific R. R. Co., 87 Mo. 74; Chicago, etc., R. R. Co. v. Flexman, 103 Ill. 546; Stewart v. Brooklyn R. R. Co., 90 N. Y. 580; Pennsylvania R. R. Co. v. Vandiver, 42 Penn. St. 365; Weed v. Panama, 17 N. Y. 362; Chamberlain v. Chandler, 3 Mason (U. S.) 242.]

In *Nightingale v. Union Colliery Co.*, 35 S. C. R. 65, it was held that in the absence of evidence of gross negligence a carrier is not liable for injuries sustained by a gratuitous passenger. This case is referred to by Osler, J.A., in *Ryck-*

man v. Hamilton, Grimsby, and Beamsville Electric R. W. Co., 10 O. L. R. 419, 425, 6 O. W. R. 271, 275, where he points out that high authority is not wanting to the contrary of this view, and where numerous cases bearing upon the question of a carrier's liability are reviewed.

In the present case, if the view be taken that he was a gratuitous passenger, I think the act of the conductor was at least that of gross negligence. It was more. It was wilful, in the sense of being intentional, and was an act which, I think, from its nature, was likely to cause injury.

Then with reference to the question of contributory negligence. It may be said that it was carelessness on the part of the plaintiff to stand on the steps, or to attempt to get off while the car was in motion. To this it seems to me to be sufficient to say that the plaintiff was not injured by standing on the steps: see *Simpson v. Toronto and York Radial R. W. Co.*, 10 O. W. R. 33; nor was he in the act of getting off the car while in motion. That did not cause the accident. The proximate cause of the accident, as I have already found, was the act of the conductor.

On the question of damages the defence offered no evidence. I find that the plaintiff was permanently injured, and that the injury materially affects his earnings. He was in receipt of \$3 a day; he was a young man of 23. Having regard to all the circumstances of the case, I assess damages at \$2,000, for which I direct judgment, with costs of the action.

BRITTON, J.

DECEMBER 19TH, 1907.

TRIAL.

CADIEUX v. ROULEAU.

Husband and Wife—Pre-nuptial Contract in Quebec—Law of Quebec—Community of Property—Land Situate in Ontario—Will—Distribution of Proceeds of Sale—Heirs of Wife—Heirs of Husband—Judgment—Petition to Set aside—Reference—Costs.

Petition by Amable Pilon and others to set aside a judgment and to establish community as to the estates of the late Barnabe Cadieux and his wife Marguerite.

H. W. Lawlor, Hawkesbury, for the petitioners.

C. G. O'Brian, L'Original, and W. S. Hall, L'Original, for plaintiff F. X. Cadieux.

J. Maxwell, L'Original, for infants.

E. Proulx, L'Original, for Sophie Rouleau.

BRITTON, J.:—On 11th February, 1850, Barnabe Cadieux and Marguerite Lacombe, then both of the county of Vaudreuil, in the province of Quebec, and engaged to be married each to the other, entered into a pre-nuptial contract in notarial form, in said county. This contract was made in the French language. . . . The part material . . . is, in the translation, in the following words: "In consideration of their mutual love and affection, the future consorts hereby equally and mutually donate each to the other, and to the survivor of them, accepting, all the movables and immovables which they actually possess and will acquire during said intended marriage, even as propres, which shall be found to belong to the one who shall die first, and to compose his or her succession at time of his or her death, whatever said property may amount to, and wherever it may be situated, said gifts to be enjoyed by the survivor in usufruct only during his or her life, and the said survivor shall not be bound to give security therefor, but will be obliged to cause an inventory therefor to be made, and at the extinction of the said usufruct the said property, movable and immovable, to return and to become the property of heirs and legal representatives of the said future consorts according to the side and line of which they will proceed. . . . The present donation is made on condition that at the death of the predeceased there be none of their children living, or to be born, from the said marriage; nevertheless if, there being children, they happen to all die in minority or before being emancipated by marriage, this donation shall resume its force and effect."

Soon after the contract was made, the intended marriage was duly solemnized, and the parties went to the township of Alfred, in the province of Ontario, and there made their home and continued there to reside. Barnabe Cadieux purchased the east quarter of the south half of 13 in the 6th concession and the east quarter of the north half of 13 in the 7th concession of Alfred, 50 acres in all.

and in a hospital in Montreal for treatment, attended before notaries in that city and made a will, a translation of which was produced. In it the testator calls his wife "Edwidge." She was married by the name of Marguerite. So far as material, the will is as follows: "And as to all the property, whether movable or immovable, which I may leave at the time of my death, I give and bequeath the enjoyment and use of it to Dame Edwidge Lacombe, my dearly beloved wife, and that during her life and so long as she shall remain my widow, and without her being liable to make any inventory of it, or to give security, willing and intending that such enjoyment shall be inalienable and unseizable for any cause or reason whatsoever, the said enjoyment being bequeathed to her by way of alimentary allowance. . . . And as to the corpus of my said property, I give and bequeath the same to my nephew Francois Xavier Cadieux, son of Jean Marie, farmer, residing in the said township of Alfred. . . . In order that the said F. X. Cadieux may sell and realize the property of my succession at the expiration of the said usufruct, and employ the proceeds (excepting always the sum of \$400, which he may keep for himself as his property) in pious works according to my intention and that of my said wife, and more specially for the work or the propagation of the faith in the distant missions of America."

Barnabe Cadieux died at the township of Alfred on 13th April, 1881, the owner of the land above mentioned, leaving his wife him surviving, but no children as the issue of said marriage.

The widow remained in possession and enjoyment of said lands until her death, which occurred on 15th July, 1905. She did not marry again, and she died intestate, leaving no children, but she left brothers and sisters and the descendants of other brothers and sisters.

On 2nd February, 1906, Francis Xavier Cadieux commenced an action in the High Court of Justice, asking: (1) that the will above mentioned of Barnabe Cadieux be interpreted and the trusts declared; (2) that the land be sold; and (3) that the rights and interests of all parties entitled to the said lands be ascertained and declared.

That action came on for trial at L'Original on 4th April, 1906, before Teetzel, J., and judgment was then and there

given as follows: (1) that the gift of the proceeds of the sale of lands or real property in Ontario for pious works or for the benefit of the distant missions of America is void; (2) that the plaintiff F. X. Cadieux was entitled to the sum of \$400 out of the proceeds of the sale of the lands in the pleadings mentioned, but that he should not be allowed any remuneration as trustee under the said will; (3) that except as to the \$400 Barnabe Cadieux died intestate; (4) that there be a sale of the lands, and the usual reference . . .; (5) that Sophie Rouleau continue to represent the adult heirs-at-law of Barnabe Cadieux, deceased, throughout the proceedings in the Master's office, and that the official guardian do continue to represent the infant heirs-at-law; and (6) that costs of all the parties up to and including the trial of the action be taxed and paid out of the proceeds of the land, and that further directions and costs of the reference be reserved.

The judgment was carried into the Master's office, the lands were sold, and the Master made his report on 8th May, 1906, shewing that the lands were sold at auction on 28th April, 1906, to one Xavier Leduc for \$2,500, and that the sale was properly conducted.

On 6th March, 1907, Amable Pilon and 6 others, heirs-at-law of Edwidge Cadieux, filed in the Court a petition praying that the judgment be set aside, and that the parties to the petition might be declared entitled to share in the distribution of the estate, etc.

On 16th May, 1907, the matter of this petition came up in Court at Toronto before Teetzel, J., when the following order was made: (1) that the petition be set down to be heard at the next sittings of the Court at L'Original; (2) that Amable Pilon be appointed to represent the heirs-at-law and next of kin of Edwin Cadieux for the purposes of the petition, and that the heirs-at-law and next of kin should be bound by any order made on the hearing of the petition; (3) that upon the hearing of the petition Amable Pilon and the parties to this action be at liberty to adduce such evidence as they may be advised in support of and in answer to the petition; (4) that the plaintiff and defendants be at liberty to file and serve a special answer to the petition . . .; (5) that the cost of the hearing of the petition and of that application should be disposed of by the Judge hearing the petition.

On 28th June, 1907, the plaintiff F. X. Cadieux filed a special answer to the petition, denying the charge of wrongful concealment, alleging good faith, etc., and setting up, amongst other things: (1) that at the most the ante-nuptial contract referred to rendered the consorts liable to account to each other for the proceeds of any real estate they or either of them may have acquired in this province; (2) that Barnabe Cadieux was not incapable of making a will, and under the alleged contract his share in the assets of the community would be governed and determined by his will; (3) that to carry out the contract as to property in this province it is necessary that the estate of the consorts should both be administered; (4) that the petitioners' proceedings are defective by reason of no personal representative of either Barnabe Cadieux or Edwidge Cadieux having been appointed; (5) that in 1873 Barnabe Cadieux became the owner of the easterly $33\frac{1}{2}$ acres of the north half of lot 13 in the 6th concession of Alfred, and entered into possession of that land; (6) that on 14th June, 1880, Marguerite Cadieux obtained what purported to be a conveyance of said last mentioned land or of some interest therein from one John Whyte, an assignee in insolvency of one of the grantors named in the conveyance to Barnabe Cadieux; (7) that after the death of Barnabe Cadieux, to wit, on 29th August, 1899, Edwidge Cadieux conveyed the $33\frac{1}{2}$ acres to her grand-nephew, one Wilfrid Pressault, for the expressed consideration of \$200, and that Pressault is now in possession of said land; (8) that the value of said $33\frac{1}{2}$ acres is about \$2,000, and that in taking the accounts on the footing of the pre-nuptial contract Edwidge Cadieux should be charged with the real value of the said parcel of land so taken by her out of the assets of the community; and finally Francois Xavier Cadieux asks the direction of the Court as to bringing an action against Wilfrid Pressault for the recovery of the $33\frac{1}{2}$ acres of which he is now in possession. . . .

I find the facts as to the pre-nuptial contract to be as above set forth. The parties then had their domicile in the province of Quebec, and in that province, as stated, and on 11th February, 1850, the contract was duly entered into; but their removal to Ontario, their deaths at the respective dates mentioned and without issue, are all correctly stated.

I find that Barnabe Cadieux made his last will and testa-

ment in the province of Quebec on 26th September, 1876, and that Marguerite Cadieux died intestate.

The pre-nuptial contract is valid between the heirs and legal representatives of Barnabe Cadieux and Marguerite Cadieux, and enforceable as to all the property, real and personal, owned by them during their marriage, whether such property be situate in Ontario or Quebec.

Taillifer v. Taillifer, 21 O. R. 337, is express authority upon this point. In the present case, as in the one cited, the contract was entered into before two notaries for the province of Quebec. "The evidence respecting the law of that country shews that it is a good and valid contract according to such laws." . . .

Upon the facts, the case cited is entirely in point. There was no wrongful concealment on the part of F. X. Cadieux, no fraudulent attempt to get the better of the heirs of Marguerite Cadieux.

There was no fraud on the part of Marguerite Cadieux in making the conveyance of the 33½ acres to Wilfrid Pressault. So far as can be determined from the mere fact of the form of the conveyance and Pressault going into possession and continuing to hold the land, I am of opinion that Marguerite Cadieux supposed she owned the property, having purchased it from Whyte . . . and that for some reason she sold it or sold some interest in it for \$200. There certainly is no evidence of any moral fraud, and legal fraud cannot be imputed from the mere fact of her selling whatever interest in the land she did sell to Pressault for \$200. The evidence establishes that these 33½ acres are now worth \$1,200. It is not shewn with any certainty that they were worth so much in 1899, but they were in fact worth more than \$200. Marguerite Cadieux received the \$200, and as against her heirs this sum must be brought in, and they must be charged with the amount.

Pressault is not a party to this action, nor has he been brought in by the petitioners.

I give no direction to F. X. Cadieux as to any action or other proceeding against Pressault. By the abstract of title to the 33½ acres, which was proved without objection, it appears that Pressault has given two mortgages upon the property, which mortgages appear to stand against any interest he has in it.

I do not assume to deal in any way with the 33½ acres of land, but simply with the \$200 which came to the hands of Marguerite Cadieux.

The judgment of Teetzel, J., in regard to the will of Barnabe Cadieux stands, and subject to that, and subject to the \$400 in favour of the plaintiff F. X. Cadieux, mentioned in that judgment, the heirs-at-law of Barnabe Cadieux are entitled to one-half of \$2,500, being the proceeds of Barnabe Cadieux's lands under the judgment, and also to one-half of the amount of the interest in the 33½ acres sold by Marguerite Cadieux, and the heirs of Marguerite are entitled to the remaining half, less the \$200. . . . The petitioners' costs and the costs of all parties on the application for the order for trial and of the trial and hearing of the petition and of the reference to be taxed and paid out of the money in Court.

The action and the petition must now be referred to the local Master at L'Original to ascertain the names and residences of the parties who are entitled to claim as heirs-at-law of Barnabe Cadieux and Marguerite Cadieux, otherwise called Edwidge Cadieux, respectively, and to tax costs.

The amounts to go to the heirs-at-law of Barnabe Cadieux and Marguerite Cadieux respectively are to be found as follows: the proceeds of the farm sold under the judgment in the action.....\$2,500
The sum charged against Marguerite Cadieux 200

\$2,700

Deduct the costs, and divide balance into two equal parts. From Barnabe's part deduct \$400 payable to F. X. Cadieux under the judgment, and distribute the balance amongst the heirs of Barnabe Cadieux. From the part payable to the heirs of Marguerite Cadieux deduct the \$200 received by her in her lifetime, and distribute the balance amongst the heirs of Marguerite Cadieux.

The money in Court to be paid out in accordance with the report of the local Master.

RIDDELL, J.

DECEMBER 20TH, 1907.

TRIAL.

TEMISKAMING AND NORTHERN ONTARIO RAIL-
WAY COMMISSION v. ALPHA MINING CO.RIGHT OF WAY MINING CO. v. LA ROSE MINING
CO.*Mines and Minerals—Railway—Right of Way—Encroach-
ment—Statutes—Trespass—Damages.*

Actions for damages for encroaching upon and taking away valuable mineral from under the land occupied by the plaintiffs' railway as "right of way."

The facts out of which the litigation arose are set out in *La Rose Mining Co. v. Temiskaming and Northern Ontario Railway Commission*, 9 O. W. R. 513, 10 O. W. R. 516.

D. E. Thomson, K.C., and A. W. Fraser, K.C., for plaintiffs.

G. H. Watson, K.C., and J. B. Holden, for defendants.

RIDDELL, J.: . . . It is admitted that the case above cited concludes the defendants from claiming any right to act in the way complained of (as it is admitted they have done), and the only question is as to the right of the plaintiffs. My brother Mabee expressed an opinion that the Act 6 Edw. VII. ch. 12 was conclusive, and I agree with him.

There can be no question upon the evidence that before any discovery of mineral by La Rose or McMartin, the location of the railway and 90-foot "right of way" had been fixed at precisely the present position, and that the Commission was then and continuously thereafter in open, public, and notorious possession.

The Act referred to, 6 Edw. VII. ch. 12, sec. 2, provides that the order in council of 24th January, 1906, did at and from the passing of the Act 2 Edw. VII. ch. 9, i.e., the 17th March, 1902, vest in the Commission the fee simple in these lands "and all mines and minerals being or lying in or under the said lands and all mining rights therein and thereto absolutely, freed from all claims and demands of every nature whatsoever in respect of or arising from any lease or

granted." In the face of this express statutory provision it is quite useless to advance arguments, however ingenious (and those of counsel were ingenious), based upon the provisions of general Acts such as the Railway Act, Mines Act etc. All technical difficulties urged are got rid of by the present shape of the record.

The plaintiffs have made out their case, and are entitled to judgment, with costs, for the amount agreed upon

CLUTE, J.

DECEMBER 20TH, 190

TRIAL.

ROBERTS v. TOWN OF PORT ARTHUR.

Municipal Corporation—Sewer—Overflow—Flooding Premises of Householder—Construction of Sewer—Insufficiency—Heavy Rainfall—Responsibility of Municipality—Damages.

Action for damages for injury done to plaintiffs' premises by flooding.

W. D. B. Turville, Port Arthur, for plaintiffs.

F. H. Keefer, Port Arthur, for defendants.

CLUTE, J.:—The plaintiffs are lessees of part of lot No 11 situate at the north-east corner of Wilson and Cumberland streets in the city of Port Arthur, and carry on the business of wholesale fruit merchants therein.

On 15th July, 1907, the plaintiffs' cellar was flooded from the defendants' sewer drain, causing damage to the plaintiffs. It is charged that this damage was owing to the defendants' negligence: (1) in constructing a number of catch basins for surface water and turning it into the sanitary sewer; (2) in the negligent construction of their sewerage system, inasmuch as they failed to provide a storm sewer for the surface water, and in emptying two drain pipes of larger dimensions into an outlet of a smaller size, thereby overtaxing the capacity of the sewer, and causing

the sewerage and other commodities thus accumulated to find an outlet into the plaintiffs' cellar; (3) in not properly flushing the sewer; (4) in not furnishing traps or flaps at the connection of the plaintiffs' cellar with the city sewer, which, it is alleged, it was their duty to do, inasmuch as they attempted to drain a larger pipe into the smaller, an insufficient outlet with a minimum fall.

The plaintiffs' allegations are denied by the defendants, and they further plead that the storm which caused the injury was practically a cloud burst, being unusually heavy and lasting about 10 hours without interruption; that the defendants passed a by-law, which was enforced on 15th July, which required that all "private sewers and drains, stable yards, timber, or wood drains, may be connected with the storm sewers, and cellar drains may be connected with the sanitary sewers, but all such connections shall be made according to the rules and regulations prescribed and according to the direction of the engineer, and all such connections shall be made at the owner's risk in case of water backing up;" . . . that the drain in question was one in which no requisition was made to the city for sewerage connection; that the plaintiffs had not provided the back pressure valve, as required by by-law No. 705, passed on 16th May, 1904, paragraph 84, which provides that "proper check valves or mechanical back water traps shall be placed on all cellar drains, in addition to the water seal trap, where there is any possible danger of flooding from the sewer or from the rain water leaders. It is recommended that they be placed on all drains where the bottom of the cellar or basement is less than two feet above the top of the street sewer."

The defendants further charge that the plaintiffs neglected to comply with this by-law or have such protection, and that it was by their own negligence that damage was caused.

I find the facts to be as follows. The building on premises in question was removed from the lake-front and placed at the south-east corner of Cumberland and Wilson streets in 1900, and at the same time a connection was made with the city sewer or drain, which at that time commenced at Cumberland street and continued down Wilson street into the bay. I find that at the time this connection was made there existed a resolution of the council that "in future no

council, and all connections must be made under the direction of the town engineer, at the parties' expense." I find further that, as a matter of fact, this resolution was never acted upon; that there never was a resolution of the council in regard to connections made with the drain down, at all events, to 1903; that the practice was that the property owners desiring connections had the drains dug; and that the city had an oversight of what was done by their engineer. There was no direct evidence as to what took place in connecting the premises in question with the Wilson street drain, but from the general practice, and from the evidence, I infer, and find, that the usual practice was followed, and that the connection was made with the assent and approval of the city authorities.

It does not appear that the by-laws above mentioned ever came to the notice or knowledge of the plaintiffs or their landlord. After 1903 the sewerage system of the city was considerably extended, and drains were constructed connecting with the 14-inch drain on Wilson street, at the corner of Wilson and Cumberland, of much greater capacity than the 14-inch drain. One expert said that the drains thus emptying into the 14-inch drain were more than 7 times the capacity of the 14-inch drain. At all events, the drains so connected were more than double its capacity. It was explained by the city engineer that the system of storm drains had been put in since 1903, largely covering the area of the sanitary drains. He admitted, however, that when these became stopped up, the catch basins would overflow and so increase the drain on Wilson street. The Wilson street drain had originally been constructed 15 inches, but in the year 1904, 250 feet of drain in the water being the outlet of the Wilson street drain was taken up, and the 14-inch drain put down in its place, with a grade of one to 500 feet. The grade of the drains emptying into Wilson street was very much higher.

It was established beyond all doubt that the Wilson street drain was not sufficient to carry off the water which emptied into it, in case of heavy rains, and, on the occasion in question, it was shewn that one Benson, a witness, having occasion to go into the man-hole of this drain, saw that it was flooded and incapable of carrying away the water and that it flooded another cellar on the same occasion.

The evidence satisfied me, and I find as a fact, that the overflow into the plaintiffs' cellar was from the Wilson street drain, and that it was caused by the increased quantity of water emptying into it from the other drains, which had been constructed by the defendants since 1904, and which it was incapable of discharging.

Part of the cost of the Wilson street drain was levied upon the property in question by a frontage tax.

It is further shewn in evidence that the traps directed to be put in by the city did not prevent the overflow of the drain in case of storms, as it was shewn that on the same occasion another cellar was flooded where the trap had been put in. The fall from the premises in question to the city drain was $3\frac{1}{2}$ feet, so that by-law No. 705 would not apply, as they were recommended only where the bottom of the cellar or basement is less than 2 feet from the top street sewer.

On the day in question the rainfall to 7 o'clock was 67-100 of an inch and from 7 to 10 was 1 80-100. The evidence shewed that while the rain on the occasion in question was a heavy rainfall, it was not unusual, as in 1903 and 1905 there had been heavier rainfalls within the same length of time.

I think this case is distinguishable from *Faulkner v. City of Ottawa*, 10 O. W. R. 807, both as to the quantity of the rainfall and in the fact that after the construction of the 15-inch drain on Wilson street, the outlet of that drain was reduced to 14 inches, and there were other sewers or subsidiary drains led into it, and that, owing to the additional quantity of water led into it by these drains, the discharge was insufficient.

I find the defendants guilty of negligence in thus conducting into their drain a quantity of water which it was incapable of discharging, and that this negligence was the direct cause of flooding the plaintiffs' cellar, causing the damage complained of.

I direct judgment for the plaintiffs, with a reference to ascertain the amount of damages, and that judgment be entered for the amount so found, with costs of action and of the reference. Counsel having agreed to name a referee, if this is not done before the judgment issues, I will name a referee on application.

MEREDITH, C.J.

MAY 2ND, 1907.

DIVISIONAL COURT.

JUNE 11TH, 1907.

WEEKLY COURT.

DIVISIONAL COURT.

RE WYNN AND VILLAGE OF WESTON.

Municipal Corporations—Local Option By-law—Approval of Electors—Voters' Lists — Persons Entitled to Vote—Polling Places — Statutory Declarations of Secrecy—Municipal Act, 1903, secs. 348, 368.

Motion to quash a local option by-law.

J. Haverson, K.C., for the applicant.

H. E. Irwin, K.C., for the village corporation.

MEREDITH, C.J., held that, on a proper interpretation of sec. 348 of the Consolidated Municipal Act, 1903, the clerk of the municipality was justified in treating as included in the list of voters therein referred to, persons found by the County Court Judge, upon revising the voters' list of the municipality, to be entitled to vote.

Also, that the provisions of sec. 36 of the Act, requiring a statutory declaration of secrecy to be made by every officer and clerk authorized to attend at a polling place, is directory only, and that the failure of the officers to comply with its requirements does not invalidate the election.

Also, that it is competent for the council not to hold a poll in each subdivision of the municipality, if thought expedient.

An appeal from this decision was dismissed by a Divisional Court (MULOCK, C.J., ANGLIN, J., RIDDELL, J.)

MEREDITH, C.J.

DECEMBER 20TH, 1907.

CHAMBERS.

SWITZER v. SWITZER.

*Particulars—Statement of Defence—Action for Alimony—
Defence Alleging Adultery of Wife—Times and Places.*

Appeal by plaintiff from order of Master in Chambers,
ante 949.

G. H. Kilmer, for plaintiff.

W. E. Middleton, for defendant.

MEREDITH, C.J., dismissed the appeal with costs to defendant in any event.

RIDDELL, J.

DECEMBER 21ST, 1907.

CHAMBERS.

MULLIN v. PROVINCIAL CONSTRUCTION CO.

*Execution—Stay pending Appeal to Divisional Court—Rule
827—"Judge of Court Appealed to"—Trial Judge—
High Court — Counterclaim—Grounds of Appeal—Re-
moval of Stay as to Part—Costs.*

Motion by the plaintiff under Rule 827 (2) for an order directing that execution upon his judgment against the defendants should not be stayed, notwithstanding the setting down of an appeal by the defendants from that judgment to a Divisional Court.

J. H. Denton, for plaintiff.

H. D. Gamble, for defendants.

RIDDELL, J.:—This was an action tried before me at the non-jury sittings at Toronto. The plaintiff claimed the price of a quantity of sand delivered from his pit and received by the defendants. The defendants alleged that the sand delivered was inferior to what the plaintiff had represented

the plaintiff entered the office of the defendants . . . and upset and threw the office into confusion, throwing on the floor the office books of account of the defendant company, and abusing and otherwise annoying the employees and servants of the company;" and for this they claimed \$200.

At the trial I found the facts against the defendants . . . and directed judgment to be entered for the plaintiff upon his claim for \$738.75. The defendants were not ready to go on with the trial of their counterclaim, by reason of the absence of a material witness, and I gave them the option of withdrawing the counterclaim and bringing a new action or of adjourning the trial of the counterclaim: they accepted the latter alternative. The counterclaim has not yet been tried, neither party being at fault respecting the delay.

I refused to stay the issue of the judgment until the trial of the counterclaim. Upon the same day judgment was entered and execution issued and placed in the hands of the sheriff of Toronto. The defendants served notice of motion to a Divisional Court, claiming \$214.50 for damages for breach by the plaintiff of his contract as to the quality of the sand; and thereupon applied for a fiat on 12th December. A fiat was granted to set down the appeal, and (no doubt per incuriam) also to stay the execution. Rule 828 provides that upon an appellant becoming entitled, by setting down an appeal to the Divisional Court, to a stay of execution, a fiat may issue staying the execution in the hands of the sheriff. This fiat cannot, however, issue under this Rule unless and until the appellant has become entitled to a stay, which at the time of the application he was not. The appeal is set down.

A motion is now made by the plaintiff, under Rule 827 (2), for an order that the execution shall not be stayed, notwithstanding the setting down of the appeal. This motion is in no way an appeal from the fiat; but is a motion rendered necessary, as it is contended, by the stay automatically effected by the setting down of the appeal.

It is objected that I am not "a Judge" of "the Court appealed to"—it being contended that the appeal is to a Divisional Court, and that under sec. 70 (2) of the Ontario Judicature Act I am precluded from sitting in a Divisional Court upon this appeal. I have had the opportunity of con-

sulting with a number of my brethren, and I am clear that the objection is without foundation. Section 68 of the Act provides that the King's Bench, Chancery, Common Pleas, and Exchequer Divisions shall not sit as such Divisions; and there shall be no Divisional Courts of any of these Divisions; but the Divisional Courts shall be Divisional Courts of the High Court. An appeal is taken to "a Divisional Court of the High Court or to the Court of Appeal:" Rules 782, 783: and where to a Divisional Court, it is really to the High Court. When Rule 827 (1) or (2) speaks of "the Court appealed to," the distinction is indicated between the Court of Appeal and the High Court—not between certain members of the High Court and other members of the same Court. The objection is overruled. In my judgment, motions of this kind are generally best made before the Judge who tried the action, and who should be most conversant with the facts. As to that, however, much may be said on both sides.

As to the merits, I should not think of staying the execution until the trial of the counterclaim, even if it be seriously intended to proceed with a claim that cannot be expected to result in a substantial verdict. The counterclaim is, in my view, in any event, one which should not have been joined with the action. Many cases are cited in *Holmsted and Langton*, pp. 459-461, where just such counterclaims were held not capable of being conveniently tried in the action. There is no suggestion that the plaintiff is not a man of substance, or that, if a verdict were obtained upon the counterclaim, there would be any danger of its not being paid.

As to the claim, it will be noted that the sole ground of appeal is that the defendants should have been allowed damages (which they fix at \$214.50) for breach of warranty. There is no appeal against the remainder (\$738.75, less \$214.50, equals \$524.25), and no ground is alleged why this should not be paid. The execution should not be stayed as respects . . . \$524.25.

In respect of the \$214.50, it must be kept in mind that "the general rule and the right of the appellant is that, save in the excepted cases, proceedings below are stayed upon the appeal being perfected; . . . a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause: *Centaur Cycle Co. v. Hill*, 4 O. L. R. at p. 95, 1 O. W. R. 377, 401. All that is shewn here is the belief

by the plaintiff that the defendants have no defence to the action, and that their present appeal is merely for the purpose of delay, added to the affidavit of the plaintiff's solicitor that the plaintiff has expressed considerable anxiety as to the financial ability of the defendants to pay the claim, and the solicitor's own belief that the defendants' appeal is to delay the plaintiff and obtain some time to raise the money. There is no suggestion that by staying the execution the plaintiff will probably lose his claim; and no facts are set out from which such an inference can be drawn. On the present material, I do not think that the motion can succeed to the full extent; but I reserve leave to the plaintiff to move again in case facts come to his notice indicating danger to his claim.

As to the costs to which the plaintiff is entitled under the judgment, I understand that the execution does not cover them; so that there will be a sum against which to draw for costs which may be awarded to the defendants by an appellate Court.

The order will be that the stay effected by the setting down of the appeal be removed, to the amount of \$524.25, unless the defendants pay that sum to the plaintiff's solicitor upon the judgment on or before 26th December, 1907.

Costs of this motion, if the pending appeal be proceeded with, to the plaintiff in the appeal; if the appeal be not proceeded with, to the plaintiff in any event. The principle upon which I proceed is that, as the plaintiff has succeeded in part, he should not pay costs in any event; and if the appeal is simply for time, or if it turn out to be ineffectual, the plaintiff should be paid his costs.

TEETZEL, J.

DECEMBER 21ST, 1907.

WEEKLY COURT.

RE CAFFERTY.

Will — Construction—Devise—Determination of Nature of Estate—Summary Application—Rule 938—Scope of.

Motion by Cecilia Cafferty, a daughter and devisee under the will of Michael Cafferty, who died in 1873, for an order under Rule 938 declaring the true construction of the will.

W. M. Douglas, K.C., for the applicant.

J. E. Jones, for the respondents.

TEETZEL, J.:—The applicant is a devisee under the will, and the question is whether she takes a fee simple or a fee tail or a fee simple with an executory devise over, or whether in any case, under the terms of the will, she has during her lifetime an absolute power to sell.

The executors made a conveyance of the lands to her, so far as they had power to do under the will.

The will, *inter alia*, provided that if the applicant should die without lawful issue, any of the devised property then remaining should go to her sister Mary Ann Cafferty, if she survived, or to her lawful issue, and that if both daughters should die without issue, the property should go to the Roman Catholic Episcopal Corporation of the Diocese of Toronto.

Mary Ann Cafferty has since died, leaving a husband and one daughter.

The only parties served with notice of the application are John and Mattie Tobin (the husband and daughter of Mary Ann Cafferty) and the Roman Catholic Episcopal Corporation, and they and the applicant are the only persons interested in the application.

Objection was taken by counsel for the Tobins that the question cannot be disposed of under Rule 938, citing *In re Davies*, 38 Ch. D. 210; *Re Martin*, 8 O. L. R. 638, 4 O. W. R. 429; *In re Newman's Trusts*, 29 L. R. Ir. 9.

I am of opinion that the objection must prevail. Adopting the language of Street, J., in *Re Martin*, *supra*, the question propounded is one with which the executors have nothing to do, and does not in any way relate to the administration of the estate.

In re Davies, *supra*, decided that under the English Rules (which, so far as affects an application like this, are, I think, as comprehensive as our own Rules 938 and 939) there is jurisdiction to determine such questions only as before the existence of the Rules could have been determined under a judgment for the administration of an estate or execution of a trust, and consequently that there is no jurisdiction upon an originating summons to decide a question arising between legal devisees under a will.

See also *In re Royle*, 43 Ch. D. 18; *Re McDougall*, 8 O. L. R. 640, 4 O. W. R. 428.

The costs of the respondents will be costs in the cause, to them only, in any other proceeding which the applicant may be advised to adopt.

TRIAL.

McKIM v. COBALT-NEPIGON SYNDICATE.

Contract—Advertising—Construction of Contract—Moneys Expended by Advertising Agent—Breach of Contract—Loss of Profit—Damages—Services—Remuneration—Quantum Meruit—Evidence—Credibility of Witnesses—Evasion in Taking Oath—Entire Contract—Failure in Part—Termination of Contract—Refusal to Pay.

Action to recover money paid out by plaintiff for defendants in pursuance of an advertising contract, and profits which plaintiff would have made if defendants had carried out the contract. Counterclaim by defendants against plaintiff for damages.

C. P. Smith, for plaintiff.

J. Bicknell, K.C., for defendants.

RIDDELL, J.:—While there are several questions of law involved, the chief question is one of fact, depending upon the relative credit to be given to the witnesses. The chief witness for the defence was detected by the clerk of the Court kissing his thumb instead of the book, and was by him required to take the oath properly. Sometimes there is an objection taken by witnesses on sanitary grounds to kissing the book, and such objections are deserving of all attention and respect. But the present was not a case of that kind. This witness, upon being detected and challenged, kissed the book with alacrity. This is not the only reason for preferring to the evidence of this witness that of those called for the plaintiff. From their conduct and demeanour I am convinced that the facts of the case, where in dispute, are substantially as given by the employees of the plaintiff.

On 14th December, 1906, the manager of the defendants (the witness Campbell) and Somerset, Toronto manager for the plaintiff, met at Campbell's room at a hotel. Campbell handed Somerset a copy of an advertisement and a list of papers in which he wished the advertisement inserted. The plaintiff's business is that of advertising agent. And then and there it was agreed that the plaintiff should at once proceed to have this advertisement inserted in the papers

named, receiving a down payment of \$1,000, and be paid from time to time further sums as he might require them. The \$1,000 was paid over, and Somerset at once set to work to carry out his contract. Some of the papers could not be reached, owing to the defendants not giving orders in time to reach them by mail. But Somerset found that it would require a very large sum to have the advertisements inserted, and on 15th December he required the defendants to advance \$7,100 more to enable the plaintiff to take advantage of all cash discounts; and said that the defendants would be asked to settle for the balance only when all accounts were got in. This was on Saturday. On the same day the plaintiff received a letter from the defendants saying that the request for \$7,100 was not in accordance with the agreement, but that the plaintiff would receive a cheque in full on Wednesday. The plaintiff at once replied, saying that he understood the arrangement was that the defendants "were willing to pay any further amount needed," and asked for a cheque for \$7,100 on Monday before 3 p.m. Somerset on the same day saw Campbell and told him what the agreement had been according to his view. Campbell controverted this, but finally promised to send a cheque before 3 p.m. on Monday. No answer to the plaintiff's letter was sent till Monday, when the defendants informed the plaintiff that they were going to transfer their account to another firm, and on the same day a letter was sent to the plaintiff by the solicitors for the defendants threatening to hold the plaintiff responsible for damages for omitting to insert the advertisement in certain papers. The letter further insisted that the contract was for the defendants to pay \$1,000 in advance and the remainder when proof was furnished of the insertion of the advertisements. Upon the receipt of this letter Somerset again saw Campbell and told him that he could not go on with the contract unless payments were made as had been agreed upon. Campbell refused, and accordingly Somerset cancelled all advertisements.

The plaintiff now sues for the amount of money paid out and to be paid out by him, as well as loss of the profits he would have made if the defendants had carried out their agreement; the defendants counterclaim for damages.

Upon the facts set out, I am of opinion that the plaintiff is entitled to recover.

real agreement should be accepted—but I am unable to give credence to the evidence, and I am satisfied that the agreement was as set out by the witnesses for the plaintiff, coming to this conclusion largely upon the demeanour of the witnesses.

Then it is said that this is an entire contract, and that if the plaintiff failed to procure the insertion of the advertisement in even one newspaper, he must fail, citing *Appleby v. Myers*, L. R. 2 C. P. 651, and *King v. Low*, 3 O. L. R. 234. I do not think that the contract was that the plaintiff was necessarily to procure the insertion of the advertisement in all the papers named; but I think that he had fulfilled all his part of the contract when he had done all that was reasonably possible, in the usual course of business; toward having the advertisements so inserted. Any other construction would be, in my view, quite contrary to what the parties intended, and would be absurd from a business point of view.

Then it is said that the refusal by Campbell to pay as agreed was not such an act as to authorize the plaintiff to put an end to the contract. *Mersey Steel and Iron Co. v. Naylor*, 9 App. Cas. 434, and *Midland R. W. Co. v. Ontario Rolling Mills*, 10 A. R. 677, were relied upon. These were cases in which a purchaser had refused to pay for an instalment of goods, and, as is pointed out in *Midland R. W. Co. v. Ontario Rolling Mills*, at p. 685: "The rule of law is stated by Lord Coleridge in his judgment in *Freeth v. Burr*, L. R. 9 C. P. 208. 'In cases of this sort,' he said, 'when the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse the performance of the contract.' This statement of the law has been expressly adopted as correct by the Court of Appeal in *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, and by the House of Lords in the same case, 9 App. Cas. 434, while both of those appellate Courts differed from Lord Coleridge, before whom the action had been tried, in the application of the rule to the facts." The whole difficulty is in determining whether the acts amount to an intimation of an intention to abandon the contract, or, as it is put by Patterson, J.A., at p. 686: "Did the de-

fendants intimate an intention to abandon and altogether refuse performance of their part of the contract?" No such difficulty arises here. The defendants expressly refused to do that which they had promised to do; in such a case the law seems to be clear. "Whenever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract . . . the other party has thereupon a right to elect to treat it as rescinded, and may, on so electing, immediately sue on a quantum meruit for anything which he has done under it before the rescission:" Sm. L.C., vol. 2, p. 19. And that the refusal to pay money as agreed is such a refusal is shewn by many cases. It will be necessary to refer only to the judgment of Lord Blackburn in *Mersey Steel and Iron Co. v. Naylor*, 9 App. Cas. at p. 442.

The plaintiff is entitled to the amount of money paid or to be paid by him, and also to a reasonable sum for services rendered. The amount paid and to be paid is \$3,231.22, and, deducting the amount paid by defendants, \$1,000, the balance is \$2,231.22. A reasonable sum by way of quantum meruit for services rendered would be \$500, in all \$2,731.22, for which sum and interest judgment will be directed to be entered with costs. The counterclaim will be dismissed with costs. It is not a case for a stay.

If it be considered that the plaintiff is entitled to the amount of profit he would have made, the amount would be much larger than \$500.

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RIDDELL, J.

DECEMBER 16TH, 1907.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. FALLS POWER CO.

Injunction—Electric Poles and Wires—Placing in Public Highway of Town—Dangerous Proximity to Poles and Wires already in Position—Leakage of Current—Commercial Necessity—Approval of Town Council—Power and Authority—Statutes—Interference with Property of other Electric Companies.

Action for an injunction to restrain the defendants from erecting and maintaining poles and stringing and maintaining wires along the east side of Hellems avenue, in the town of Welland. See ante 983. The Bell Telephone Co. were added at the trial as plaintiffs.

E. D. Armour, K.C., and Angus MacMurchy, for the original plaintiffs.

E. H. Ambrose, Hamilton, for the Bell Telephone Co.

W. E. Middleton, for defendants.

RIDDELL, J.:—This case furnishes an example of the speed with which a case may be disposed of if the parties really desire it and if there are no difficult facts requiring prolonged inquiry. The questions for decision arose about two weeks ago in the town of Welland.

Several years ago the Bell Telephone Company, incorporated under 43 Vict. ch. 67 (D.), introduced their system into that town, and strung wires upon poles erected by them upon several of the streets, amongst them Hellems avenue. This they had the right to do without the consent of the town: *City of Toronto v. Bell Telephone Co.*, [1905] A. C. 52.

The Canadian Pacific Railway Company, incorporated by 44 Vict. ch. 1 (D.), are by sec. 16 of that Act authorized to construct and maintain a line of telegraph connected with the line along their railway, and use this for commercial purposes. At least as early as 1887 they had constructed a line of telegraph so connected which ran through Welland, and, amongst other streets, on Hellems avenue. This was and is one of the main channels of communication between Toronto, Buffalo, and Detroit. No question is raised by the defendants as to the right of these two companies to use the streets as they have done.

For convenience the two companies have been and are using each other's poles on the east side of Hellems avenue. At the point in question in this action the poles belong to the Canadian Pacific Railway Company; they each have 4 cross arms, the upper two carrying 4 wires each of the Canadian Pacific and the lower two the Bell Telephone Company's wires, 10 and 4 respectively—the poles being about 38 ft. 6 in. high out of the ground.

About two weeks ago the defendant company, a company buying power and distributing it, having received permission from the town (by-law 244) to erect and place a transmission line along and over the streets of Welland, began a line of poles along the east side of Hellems avenue as far as Grove street, along which street it was intended to turn east to another street running south. The intention was to run two sets of wires, the upper carrying 12,000 volts and the lower 2,200 volts, either being admittedly a dangerous current. In doing so they erected two poles about 53 feet high, having three gains cut therein for cross arms, and these poles actually touch the wires of the plaintiffs.

An interim injunction was applied for by the Canadian Pacific Railway Company, and granted by the Chancellor;

this I continued on 5th December, upon terms that the parties should proceed to trial in a week (ante 983). The case accordingly came before me for trial at the non-jury Court at Toronto on the 12th inst. At the trial the Bell Telephone Company were added as parties plaintiffs.

A very considerable quantity of evidence was given on either side; and, upon such of the evidence as recommends itself to me, I find that even if the construction go no further, the poles as they stand will almost certainly cause a leakage of the current in some of the wires of both plaintiff companies, and will, therefore, be a substantial injury to the plaintiffs. This may not be continuous, but will almost certainly happen whenever the poles become moist by rain, etc. Nor can the poles be so placed in their present sockets, or between the wires of the plaintiffs, as that in case of wind the poles will not touch some of the wires, and if the wind is accompanied by rain there will result substantially interference with the business of the plaintiffs.

I find further that, it being necessary for linemen of the defendants from time to time to ascend these poles (about once a month is suggested by the superintendent of operations, Houston), it is to be anticipated that these workmen will or may (quite unintentionally) interfere with the wires of the plaintiffs and cause the plaintiffs serious injury.

But these are of comparative insignificance, in my view, compared with the serious danger of damage to the plant of the plaintiffs, and still more of death or injury to their employees and to the public, the customers of the telephone company.

The actual construction proposed by the defendants is satisfactory enough, the wire is intended to be good, and the insulators as good as are in actual commercial use. But, however good these may be, the high voltage current will from time to time—e.g., in a driving rain—leak and find its way to the wires of the plaintiffs with more or less disastrous results.

Wire which has passed the tests of the manufacturer and which is apparently sound in all respects has broken many times, and other causes are suggested for wires falling; such

an occurrence is one that must be expected as at least possible. So much is this the case that hundreds of thousands of dollars are being spent in the adjoining republic in providing safeguards against the effect of such an accident. If the wire carrying such a current were to fall, in an instant immense damage might—almost certainly would—be done to the property of the plaintiffs, and many lives might be sacrificed—lives of employee or customer. Moreover, as soon as the wires are strung and the current turned on, it will be dangerous to the lives of employees of the plaintiffs engaged on the poles, and just such an accident will be likely to occur as was the subject of the action of *Randall v. Ottawa Electric Co.*, 6 O. L. R. 619, 2 O. W. R. 1022, 34 S. C. R. 698.

I know it is not unusual to scoff at the likelihood of such a calamity; and those who desire to guard against it are called alarmists, especially by those who would be called upon to spend money. In my humble judgment, one of the worst features of our modern Canadian civilization (I do not say anything of other countries) is the too common disregard of precaution against danger to human life and limb—and I have no doubt that if any one had in advance of the “accidents” which horrified the country during the summer just past, raised his voice against the practices which resulted in these tragedies, his warning would have been laughed at, and “crank” would have been the mildest epithet fastened on him. The plaintiffs, nevertheless, have a right to see that their employees and their customers shall not be placed in peril of their lives. It must be obvious, too, that custom would be quickly lost, if the customer, actual or intended, were to know that at any time a live wire might fall upon that of the company and death and destruction follow.

“Commercial necessity” is pleaded by the officers of the defendants for this course. “Commercial necessity” not uncommonly is synonymous with “financial parsimony”—and it plainly is so in this case. An expenditure of not more than \$2,500—I should judge much less—would insure a perfectly safe method of construction under ground.

But it is said that the construction has been approved by the town council, and that the town council is the final

town council is a statutory body, having duties defined by the legislature, and no one may interfere if the limits of such duty be not transgressed. If the law be as contended, though it give the council of Welland the right to direct a construction which may result in death anywhere within a radius of 50 miles or more, the responsibility is cast upon the council, and the Court cannot divest it of that responsibility. One might venture with some confidence to say that such a direction could not have been given with a full appreciation of the possible consequences; and probably all will agree that the safeguarding of human life is of more importance than the beauty of the streets; but, if the legislature has made the council the final judge, all must submit. Before, however, such a far-reaching claim can be allowed, there must be the clearest expression of intention by the legislature in that sense. Into this we must now inquire. In *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 O. R. 571, the facts were that the telephone company had erected their poles upon the streets of Belleville, and two years thereafter the Belleville Electric Co. erected theirs. The plaintiffs, alleging that the defendant's wires were placed so near to their own that it was dangerous when the instruments were working or in electric storms, brought their action. The defendants contended that they had placed their poles where they had been directed by the city engineer, but the Court held that the "city council had not the right to destroy or prejudice the privilege they had already granted the plaintiffs:" p. 581. I do not think that there can be any difference in principle whether the "privilege" of the plaintiffs were granted by the municipality or by the Dominion of Canada—and I think the judgment of the Court would have been the same had the Court considered this privilege a statutory one rather than as granted by the city.

It is contended, however, that the legislature has, by the statute of 1906, 6 Edw. VII. ch. 34, sec. 20, given this power to the municipality. That section amends sec. 559 of the Consolidated Municipal Act, 1903, so as to make sec. 559 read thus: "By-laws may be passed by the councils of the municipalities, and for the purposes in this section respectively mentioned, that is to say: By the councils of cities, towns, and villages 4. For

permitting and regulating the erection and maintenance of electric light, power, telegraph, and telephone poles and wires upon the highways or elsewhere within the limits of the municipality." This is the same as the corresponding sub-section in the Act of 1903, except that the word "power" is introduced by the amendment of 1906.

The legislation in force at the time of the Belleville decision was 46 Vict. (O.) ch. 18, sec. 496 (47), whereby the power was given certain municipalities to pass by-laws "for regulating the erection and maintenance of telegraph and telephone poles and wires within their limits." This was consolidated as R. S. O. 1887 ch. 184, sec. 496 (39): the Act of 1891, 54 Vict. ch. 42, sec. 21, introduced the words "electric light" before the word "telegraph;" the amended section goes forward into the revision of 1892, 55 Vict. ch. 42, as sec. 496 (39); in the R. S. O. 1897 appears as sec. 559 (4) of ch. 223; and in 3 Edw. VII. ch. 19, as 559 (4). It is argued that the amendment of 1906 gives a power to the municipality which did not previously exist, and which is sufficient to enable the municipality by its fiat to entitle the defendants to act as they have done.

I do not think that a mere power given to permit the erection of electric power poles and wires gives or implies a right to confer upon an electric company the legal power to interfere with the property of others upon the streets—and the addition of the power to regulate such erection and maintenance confers no such right. It is argued that the section of the Act of 1906 which has been cited is a delegation to the municipality of all the powers of the legislature in respect of electric power poles and wires; and that the legislature must have meant that the municipality should have full power to permit the electric power companies to place their poles and wires where the municipality saw fit upon the streets; and that wherever the municipality should permit a pole to be planted, there it might legally go, no matter whose property might be destroyed, and that the power given to regulate makes this the more clear. There is no such express provision in the legislation, and I cannot find anything of the kind implied. The power is given to allow the power lines to be erected and maintained upon the streets, which power did not previously exist under the Muni-

O. 1897); but that does not mean more than it says—a company permitted to put its lines upon the streets is not a trespasser is not committing a common nuisance: Bonn v. Bell Telephone Co., 30 O. R. 696. But that permission would not justify an interference with private rights of those already there. If, indeed, it were not possible for a power company to exist and do business without interfering with the existing rights of others, there might conceivably be an argument that such an interference was impliedly authorized, but there is nothing of the kind here. The power to regulate can be to regulate only what can be rightfully permitted and upon being permitted rightfully be maintained.

If I had arrived at a different conclusion, it would have been necessary to consider whether in this case the power given to the municipality had been legally exercised. The by-law does not fix the exact position of the poles to be erected by the defendants, and it is argued that the resolution passed after the beginning of the action, approving the position, is not sufficient. If that be so, considering the very serious results which might follow from the proposed construction, I should think that the injunction should be granted; the council of the town would then have an opportunity, with full knowledge of the results to be anticipated, to dispose of the matter by the solemn act of passing, signing, and sealing a by-law.

I do not proceed upon this ground, however, but upon the ground that no power exists by which this municipality can in effect permit one company to interfere prejudicially with the property and threaten the lives of the employees of other companies, under circumstances like the present.

I have not found it necessary to consider at length the position of the Canadian Pacific Railway Company; but I think their rights are, in this case at least, on a par with their co-plaintiffs'.

An injunction will issue restraining the defendants from erecting or maintaining poles for the carriage of wires intended for conducting electricity along the east side of Hellem's avenue between Division street and Grove street, in the town of Welland, in line with and between the poles of

the plaintiffs or either of them, and stringing wires thereon over or parallel to the wires of the plaintiffs, or either of them; and also directing the defendants forthwith to remove the poles already erected upon the said east side of Helles avenue between Division and Grove streets and between the poles of the plaintiffs.

The defendants will pay the costs of the action.

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The digest includes all the cases decided at Osgoode Hall and other cases reported in THE ONTARIO WEEKLY REPORTER.

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- Contract: *National Malleable Castings Co. v. Smith's Falls Malleable Castings Co.*, 9 O. W. R. 165, 14 O. L. R. 22.
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- Contract: *Mercier v. Campbell*, 9 O. W. R. 101, 14 O. L. R. 639.
- Contract: *Gould v. McCrae*, 9 O. W. R. 626, 14 O. L. R. 194.
- Costs: *Re Sturgis, Sturgis v. Van Every*, 9 O. W. R. 663, 14 O. L. R. 77.
- Costs: *Rex v. Holmes*, 9 O. W. R. 750, 14 O. L. R. 124.
- County Court Appeal: *Mercier v. Campbell*, 9 O. W. R. 101, 14 O. L. R. 639.
- Covenant: *Carpenter v. Carpenter*, 9 O. W. R. 862, 15 O. L. R. 9.
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- Criminal Law:** *Rex v. Colahan*, 9 O. W. R. 661, 14 O. L. R. 379.
- Criminal Law:** *Rex v. Master Plumbers and Steam Fitters' Co-operative Association Limited and Central Supply Association of Canada Limited*, 9 O. W. R. 450, 14 O. L. R. 295.
- Criminal Law:** *Rex v. Brinley (or Brinkley)*, 9 O. W. R. 457, 14 O. L. R. 434.
- Criminal Law:** *Rex v. O'Gorman*, 9 O. W. R. 928, 14 O. L. R. 102.
- Criminal Law:** *Rex v. Hays*, 9 O. W. R. 488, 14 O. L. R. 201.
- Crown Patent:** *Drulard v. Welsh*, 9 O. W. R. 491, 14 O. L. R. 54.
- Damages:** *Faulkner v. Greer*, 9 O. W. R. 773, 14 O. L. R. 360.
- Damages:** *Muma v. Canadian Pacific R. W. Co.*, 9 O. W. R. 475, 14 O. L. R. 147.
- Devolution of Estates Act:** *Re Stainsby*, 9 O. W. R. 839, 14 O. L. R. 468.
- Discovery:** *Right of Way Mining Co. v. La Rose Mining Co.*, 9 O. W. R. 678, 14 O. L. R. 80.
- Division Courts:** *Re Errington v. Court Douglas No. 27 Canadian Order of Foresters*, 9 O. W. R. 675, 14 O. L. R. 75.
- Dower:** *Re Smithers*, 9 O. W. R. 819, 14 O. L. R. 536.
- Dower:** *Jones v. Shortreed*, 9 O. W. R. 705, 14 O. L. R. 142.
- Easement:** *Ruetsch v. Spry*, 9 O. W. R. 696, 14 O. L. R. 233.
- Eating Houses:** *Re Campbell and City of Stratford*, 9 O. W. R. 115, 345, 14 O. L. R. 184.
- Estoppel:** *Gentles v. Canadian Pacific R. W. Co.*, 9 O. W. R. 601, 14 O. L. R. 286.
- Evidence:** *Howland v. Macdonald*, 9 O. W. R. 337, 14 O. L. R. 110.
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- Evidence:** *Cuff v. Frazee*, 9 O. W. R. 691, 14 O. L. R. 263.
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- Insurance:** *Pense v. Northern Life Assurance Co.*, 9 O. W. R. 646, 14 O. L. R. 613.
- Insurance:** *Re Kemp, Johnson v. Ancient Order of United Workmen*, 9 O. W. R. 899, 14 O. L. R. 424.
- Insurance:** *Hawthorne & Co. v. Canadian Casualty and Boiler Insurance Co.*, 9 O. W. R. 809, 14 O. L. R. 166.
- Insurance:** *Boulter-Davies Co. v. Canadian Casualty and Boiler Insurance Co.*, 9 O. W. R. 809, 14 O. L. R. 166.
- Insurance:** *Re Canadian Order of Home Circles and Smith*, 9 O. W. R. 738, 14 O. L. R. 322.
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- Life Insurance:** *Re Kemp, Johnson v. Ancient Order of United Workmen*, 9 O. W. R. 899, 14 O. L. R. 424.
- Life Insurance:** *Pense v. Northern Life Assurance Co.*, 9 O. W. R. 646, 14 O. L. R. 613.
- Life Insurance:** *Re Canadian Order of Home Circles and Smith*, 9 O. W. R. 738, 14 O. L. R. 322.
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- Will: *Re Archer*, 9 O. W. R. 652, 14 O. L. R. 374.

E. J. L.

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